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[1] The small letters in parenthesis are the applicable paragraphs of Rule 23 (1). Accordingly, the letters (f) and (j) are omitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1957
Number

MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS, SUCCESSOR BY CONSOLIDATION TO THE INDIANA TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF GUY E. STREET, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA AND GARY CAMPBELL, DISTRICT DIRECTOR OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered June 20, 1957 (rehearing denied August 6, 1957).

(a) OPINIONS BELOW

The opinion of the United States Court of Appeals of the Seventh Circuit (hereinafter called "Seventh Circuit") is not yet officially reported, but appears in 2 Commerce Clearing House, Estate and Gift Tax Reporter, 8674, No. 11,703; the Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Indiana (hereinafter called "District Court") are reported in 2 Commerce Clearing House, Estate and Gift Tax Reporter, 8522, No. 11,657; and Finding No. 6 of said Findings of Fact sets out verbatim the February 21, 1952 judgment entered by the Probate Court of Marion County, Indiana (hereinafter called "Probate Court"). No other written opinions were rendered below, nor are other reports now available.

(b) JURISDICTION

The judgment of the Seventh Circuit appealed from was made and entered on June 20, 1957, and a copy appears in the appendix to this petition at pages 25 through 39. The Seventh Circuit denied rehearing on August 6, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and, under this Court's Rule 19, 1 (b), on each alternative ground except the last one.

(c) QUESTIONS PRESENTED

Petitioner was ordered by the Probate Court not to charge any part of the federal estate or state inheritance taxes against property taken by the widow as a result of her electing to take under the law and against her husband's will. (The taxes remained a burden upon the residue and on the widow's intestate share of the renounced residu-

ary provisions for her, but this property did not qualify for the marital deduction and hence is not at issue here.) The Probate Court construed two Items of the will as directing petitioner to pay such taxes from the residue and, secondly, held that apportionment of federal estate taxes against property which qualifies for the marital deduction would be inequitable. Petitioner paid the federal estate tax accordingly.

The Internal Revenue Service (hereinafter, together with the Justice Department acting as counsel herein, called "the Government") assessed additional federal estate taxes contrary to the Probate Court judgment. The Government reduced the amount of the marital deduction allowed, contending that the Indiana inheritance tax and one-third of the total federal estate tax (computed by algebraic equasions) should have been charged against the property qualifying for the marital deduction, thus reducing the amount of the deduction. Petitioner paid the assessment, sued in the District Court, and was granted a refund. The District Court held that the Probate Court's two grounds both correctly stated the law of Indiana, that the decision was binding in determining estate taxes, and that to tax contrary to the amounts thus irrevocably established in fact would violate due process of law under the Fifth Amendment. The Seventh Circuit reversed, holding that the Indiana law was with the Government and that the Probate Court judgment was not binding on the Government, because the Probate proceeding had ceased to be adversary in nature during the one-month interval between the judgment and a supplemental entry which defaulted one party. The Seventh Circuit's opinion failed to consider the questions of equitable apportionment or due process of law.

The questions presented are:

1. Under the law of Indiana, do express testamentary directions to the executor and trustee to pay estate and inheritance taxes from the "residuary estate" *preclude* apportionment of such taxes against real estate and personal property which a widow takes by electing against her husband's will?

2. When a widow elects to take against her husband's will, do the Indiana statutes and decisions limit her to one-third of his net estate after deducting estate and inheritance taxes?

3. Does Indiana require "equitable apportionment" of federal estate taxes which are not apportioned by a will, so as to preclude apportionment of estate taxes against property which can qualify for the marital deduction?

4. Does one attorney's withdrawal of his appearance at the request of his own client after a trial, announcement of adverse judgment and his motion for a new trial, make the judgment a consent decree?

5. When in fact and pursuant to a Probate Court order, a widow receives $344,925.59 worth of unencumbered property which can qualify for the marital deduction, is it consistent with Section 812 of the Internal Revenue Code of 1939, as amended, and with due process of law under the Fifth Amendment, for the Government to tax the residuary estate on the basis that the marital deduction should have been only $280,933.55?

(d) CONSTITUTIONAL PROVISIONS, STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

This case involves the following enactments and rules which are set out verbatim in the Appendix.

Subject	*Authority*	*Citation*	*Pages in Appendix*
Due process of law	Fifth Amendment, United States Constitution, due process clause	U.S.C.A. Constitution Amendment 1 to 18, pp. 172-281	72
Computation of marital deduction	Internal Revenue Code of 1939, Section (e) (1) (A) and (E) (i)	26 USC (1952 ed.) Sec. 812 (e) (i) (A) and (E) (i)	72
Widow's rights in real estate	Indiana Revised Statutes 1852, Ch. 27 #17, p. 248	Burns Indiana Statutes Annotated (1933 ed) 6-2313	73
Directions in will are controlling	1881 (Special Session) Ch. 45, #222, p. 423	Burns Indiana Statutes Annotated (1933 ed.) 6-1907	73
Answers in denial	1881 (Special Session) Ch. 38, #112, p. 240	Burns (1933 ed.) 2-1030	73
Guardian *ad litem* must not consent	1881 (Special Session) Ch. 38, #101, p. 240	Burns (1933 ed.) 2-1023	74
Widow's rights in personal property	1891 Ch. 185, #1, p. 404	Burns (1933 ed.) 6-2319	74
Effect of Election against will	1907 Ch. 48, #3, p. 73	Burns (1933 ed.) 6-2334	74
Jurisdiction to construe wills	1917 Ch. 141, #1, p. 520	Burns (1933 ed.) 4-2910	75
Jurisdiction to determine inheritance tax	1931 Ch. 75, #10, p. 192	Burns (1933 ed.) 6-2410	76
Court of Appeals' overruling findings of fact	Rules of Civil Procedure, Rule 52 (a)	28 U.S.C.A. Rule 52 (a)	76
Marital deduction and directions in a will	Treasury Regulations 105, Section 81.47c	T. D. 5699, 1949-1	77

Answer without information is a denial	Supreme Court of Ind. Rule 1-3	2 Burns (1946 Repl.) Part 1..... 77

(e) and (g) STATEMENT OF THE CASE

The history of this litigation was indicated briefly under the heading QUESTIONS PRESENTED. While giving more detail, this statement will avoid repetition, except when needed for clarity.

This petitioner filed a complaint in the Civil Probate, or adversary suit, docket of the Probate Court of Marion County for a construction of the will of Guy E. Street and for instructions.[1] The complaint, which begins on page 1 of the Appendix to Appellee's brief in the Seventh Circuit (hereinafter called "Petitioner's brief"), set forth various conflicting interpretations of six questions of law arising from the will. Two of the questions are still relevant, namely, the question of the scope of the will's provisions for paying taxes out of the residue, and the question of the widow's rights upon electing to take under Indiana law and against her husband's will.

Fifteen defendants, excluding unborn issue, were named in the complaint and served with summons. These were all of the heirs, insurance beneficiaries, and legatees under the will. The complaint, since it was filed by petitioner as a disinterested but vulnerable stake-holder, did not seek any particular relief, but asked for instructions and that the conflicting constructions of the will be set at rest.

---

[1] The jurisdiction of the Probate Court of Marion County was based on the fact that Guy E. Street died a resident of Marion County Indiana and that his will was probated in said Probate Court. Under Burns 4-2910 which appears in the Appendix on page 75, the Probate Court has exclusive jurisdiction of Probate matters and concurrent jurisdiction to construe wills. Under Burns 6-2410 the Probate Court has exclusive jurisdiction to determine inheritance taxes. Said statute is set forth in the Appendix on page 76.

The gross estate of Guy E. Street amounted to $999,364.71. If the Probate Court construed the will so that taxes would be apportioned against her, the widow alone would pay $53,770.01 of federal estate taxes and $10,222.03 of Indiana inheritance taxes from her marital deduction property.[1] Even though this result would reduce the marital deduction and increase the federal estate taxes by approximately $20,000.00, it would result in a net saving to the principal beneficiaries of the residuary trust, testator's two McClenon grandchildren, of approximately $44,000.00. In addition, a construction of the will which would permit apportionment of taxes against the beneficiaries of insurance (excluding that part of the insurance which was marital deduction property) would spare the residuary trust an additional $21,000.00 or more in taxes.

An apportionment of federal estate and state inheritance taxes against the widow and insurance beneficiaries, by thus saving the residuary trust a net total of approximately $65,000.00 in tax burdens, would be to the interest not only of the grandchildren, but also of six adult recipients of life incomes from the residuary trust and three contingent adult recipients of incomes from the residuary trust. All of these parties accordingly filed answers in denial.[2]

William McClenon was appointed guardian *ad litem* for his own children, testator's only grandchildren, and Donald Ream, an attorney-at-law, was appointed guardian *ad litem* for Paul Ferguson, a contingent principal beneficiary of

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[1] These facts were brought out on cross-examination of the plaintiff's witness by the defendants in the Probate Court proceeding and were before the District Court and Seventh Circuit. Government's brief as Appellant in the Seventh Circuit (hereinafter called Government's brief), page 54; Appendix to Petitioner's Brief, page 31.

[2] Several of the answers admitted the death, the probate of the will and the widow's renunciation. No answer admitted any other facts. Under Rule 1-3 of the Supreme Court of Indiana an answer without information is a denial. The rule is set forth in the Appendix on page 77. To like effect is Burns 2-1030, on page 73 in the Appendix.

the residuary trust. Both guardians *ad litem* filed answers in denial as required by statute, the McClenon answer containing affirmative allegations favoring restriction of the widow's rights and apportionment of taxes against the widow and insurance beneficiaries.

At the trial before the Probate Court on October 23, 1951, the evidence of two witnesses and a large amount of documentary evidence was presented. No facts were stipulated. Most of the trial was taken up by the cross-examination of Mr. Floyd D. Michael, the trust officer of petitioner, by Howard P. Travis, the attorney for the guardian, *ad litem*, Mr. McClenon. Both guardians *ad litem* were present in person throughout the trial. At the trial, a brief was filed by the attorney for the executor. This brief referred to decisions on both sides of the six questions at issue, except where the relevant decisions were uniform, and made recommendations as to the applicable law.

In his opening statement at the trial, Mr. Travis stated his client's position fully to the Probate Court. As his later testimony before the District Court indicated, his client instructed him and his partner, Mr. Royce, who was also present at the trial, to file a brief.[1] The attorney for the widow filed a brief with the court and served Mr. Travis with a copy on January 9, 1952, but Mr. Travis had still failed to file his brief on February 21, 1952 when the court, without prior notice to any of the parties, entered judgment and thereafter notified the parties of the judgment entered.

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[1] The Seventh Circuit erroneously interpreted Mr. Travis' affirmative answer to the leading question, "were you also instructed to file a brief . . ." as meaning that the Court ordered briefs. Briefs are not part of the record of an Indiana trial court. The point is irrelevant, except for the inferences which the Seventh Circuit drew from its erroneous interpretation. See appendix, page 34.

On the issue of tax apportionment, the Probate Court's January 21, 1952 judgment provides:

> "ORDERED ADJUDGED AND DECREED that The Indiana Trust Company, as Executor, is hereby ordered to pay all federal estate taxes and all inheritance taxes assessed by the United States, the State of Indiana or any other state, by virtue of the death of Guy E. Street or any transfer made by Guy E. Street, deceased, and The Indiana Trust Company as Executor or as Trustee is hereby ordered not to seek or receive reimbursement for any portion of said inheritance or federal estate taxes, from any person whomsoever, whether he be beneficiary of a life insurance policy, surviving joint tenant, or tenant by the entirety, heir, donee, surviving widow, assignee, legatee, devisee, cestui que trust, or other person;
>
> "That all of the above decrees and orders of the court are to be construed as instructions to The Indiana Trust Company as Executor or as Trustee as well as judgments concerning the construction of the Last Will and Testament of Guy E. Street; and that Item I of the Last Will and Testament of Guy E. Street is construed hereby as an order to the Executor for the payment of all federal estate and state inheritance and estate taxes and that said Item I is not intended as a benefit to any one particular person nor limited to any particular type of property whether passing under the will or independently of the will: . . .
>
> excluding federal estate and state inheritance and estate taxes which shall be paid from the residuary estate passing under Item V of said will in accordance with the terms of Item I of said will;"

After petitioner paid the federal estate tax exactly as directed in this judgment, the Government made an additional assessment which the Government computed by reducing the marital deduction by $63,992.04 in apportioned federal estate tax and Indiana inheritance taxes. Petitioner

paid the additional assessment and sued for refund in the District Court.

The jurisdiction of the District Court is based on 28 United States Code, 1346 (a) (1). On January 7, 1955 petitioner filed a complaint on behalf of the residuary estate, both as executor and as trustee, seeking a refund of federal estate taxes in the approximate amount of $23,000.00. The sole issue was that the marital deduction had been understated by the Government's attempt to apportion taxes against marital deduction property. On June 22, 1956, 17 days before trial, the Government filed an amendment to its answer which alleged that the judgment of the Probate Court of Marion County was not binding upon the Government, because it was contrary to the law of Indiana and also because it was in effect a consent decree.

At the trial in the District Court before Honorable Cale J. Holder, the parties submitted a written stipulation which set forth the entire Marion County Probate proceedings, including a verbatim transcript of the evidence. *As part of this stipulation between the Government and the petitioner, the February 21, 1952 decree of the Marion County Probate Court was set out verbatim as the judgment of that court,* together with figures showing the computation of the tax and of the additional assessment. The petitioner again offered in evidence the testimony of Mr. Floyd Michael, trust officer of petitioner. The defendant offered in evidence the testimony of Mr. Howard Travis, attorney in the Probate Court for the guardian *ad litem* William McClenon, who had since died. The testimony of these two men was concerned primarily with the adversary aspects of the Probate suit. Mr. Travis testified that he had been employed by Mr. McClenon and had advised his client

that the McClenon grandchildren's interests were adverse to their grandmother's, that his client had adopted this view of the case and never changed it, that no facts were withheld from the Probate Court by anyone so far as he knew, that he knew of no consent among the parties, that his own brief, which was never filed, completed, or shown to the petitioner's attorney, *was completely incompetent as evidence,* but stated his client's position, which position had been fully disclosed to the Probate Court in opening statement at the trial.[1]

Mr. Michael's testimony described the adverse financial interests of the parties on all six questions before the Marion County Probate Court, particularly the interest of insurance beneficiaries and others besides the widow in opposing apportionment of taxes otherwise than against the residuary estate. In electing to take against the will, the widow had been primarily interested in taking advantage of the marital deduction exemption provided by the federal estate tax law, but also wanted the privilege of controlling to a large extent her own affairs. The widow was an interested party in the construction of a will because what she took by the intestacy which results from her renunciation of the residuary bequests to her in the will depended upon the terms of the will.[2]

After both sides had submitted briefs and proposed findings of fact and conclusions of law, the District Court on September 24, 1956, signed a judgment which had been proposed by the petitioner.

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[1] See Government's Brief, pages 61 through 64. Petitioner's brief and appendix page 28-33. In spite of this testimony, the Seventh Circuit treated statements of fact in the incomplete Travis brief as undisputed proof.

[2] Petitioner's Brief, pages 21-28.

The only question of fact raised by the Government on appeal to the Seventh Circuit was as follows:

> "The District Court entered the following finding to which exception is taken (Appendix, infra):
>
> 'There is no evidence that any of the parties under Civil Probate No. 4261 had prior knowledge of the terms of the judgment which the Probate Court entered on February 21, 1952 or that there was any agreement or consent among the parties or any of them as to the substance of any part or all of the Probate Court's judgment so entered. Said Civil Probate No. 4261 was a genuinely contested proceeding and the interests of the widow and the Guardians Ad Litem in particular and of the defendants in general were directly adverse to each other.' "[1]

No exception was taken to any other part of Finding No. 6 or to any of the other findings.[2]

After briefs had been submitted and oral argument heard, the Seventh Circuit reversed the District Court decision with an opinion on June 20, 1957. The opinion is set forth in full in the Appendix and will be discussed under the reasons for granting a Writ of Certiorari.

The Seventh Circuit mentioned only two issues. On the first, it ignored the terms of the will and the Kentucky-Indiana rule of apportionment and held that the widow's elective share was subject to one-third of the estate taxes and to inheritance taxes.

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[1] Government's Brief, page 6.

[2] The findings are set forth in full in the appendix, page 40. Especially significant are the following unchallenged findings, to-wit: 6 (except the last paragraph, which was challenged), 14, 16 and 17. The Seventh Circuit took no notice of these findings or of their effect on the federal estate taxes, although they appear in the Government's brief, pages 79-82, 87, 91 and 92.

The only other issue considered by the Seventh Circuit was whether the decision of the Marion County Probate Court was controlling. As shown in the Appendix, pp. 34-35, the June 20, 1957 opinion of the Seventh Circuit Court (hereinafter called "Opinion"), recited that Mr. Travis testified that his clients had informed him at the time of his withdrawal that they were in agreement with the contentions advanced by the executor and the widow. This language is lifted word for word from the bottom of page 5 of the Government's Brief. There was absolutely no evidence of what Mr. Travis' client told him at the time he asked Mr. Travis to withdraw, for an objection was sustained to any conversations with this deceased client which were not in petitioner's hearing. This total absence of testimony was pointed out on pages 4 and 5 of the Appellee's Brief together with the testimony of Mr. Travis which is set forth on page 61 of the Government's Brief relative to his first advice to Mr. McClenon: *"From that time on he felt he was in an adverse position."* As shown on page 64, in response to questions by the Court, Mr. Travis testified of his client: *"I don't think he ever changed his mind about the adversary features of the case. I know he didn't."*

The Seventh Circuit's Opinion several times states that the attorney for the executor and the attorney for the widow were members of the same firm of lawyers, a statement which finds no support in any testimony under oath. It appears only in the statement of facts of an incomplete brief prepared by Mr. Travis which was offered by the Government to show the attitude of Mr. Travis' client as to the law for the Probate Court and which Mr. Travis himself described on preliminary questions as "incompetent, very incompetent."[1] It may be added that the state-

[1] Government's Brief, 58; Petitioner's Appendix to Brief, page 28-29.

ment so heavily stressed by the Seventh Circuit is not at all clear because the meaning of the word "firm" is not definite. The District Court's judicial knowledge of the customs of the local bar put it in a better position than the Seventh Circuit to interpret the evidence. Under any interpretation, the statement is not true as of the time when clients chose their counsel. Most important, the statement is wholly irrelevant, since the petitioner was a disinterested stake-holder and the parties whose financial interests were really adverse were the various defendants.

The Seventh Circuit dodged the question of what is actually necessary to render a state court decree invalid as controlling on Federal Estate Taxes by falsely representing that the petitioner had agreed that if the proceedings were not adversary it would not be binding.[1] Petitioner's statements on the subject are perfectly clear. As a matter of fact, petitioner has repeatedly alleged that the Probate Court proceeding was adversary. As a matter of legal requirements, the petitioner has just as often asserted that fraud, collusion, or agreement are necessary for the Probate Court proceeding not to be binding. Pages 29 through 35 of the Petitioner's Brief to the Seventh Circuit was devoted exclusively to this issue and expressly adopted the rule laid down in *Gallagher* v. *Smith* (C. A. 3, 1955), 223 F. 2d, 218.

Seventh Circuit concluded its opinion by holding that it had a right to review the finding of fact made by the District Court even under Rule 52 (a) of the Rules of Civil Procedure.

The Seventh Circuit actually held for the petitioner on the one issue of fact properly before it, namely, whether the proceeding was adversary at the time of the entry of

[1] Appendix, page 36, and note 9A, 9B and 10. The Seventh Circuit felt that the Court of Appeals decisions are in conflict.

judgment on February 21, 1952. This was the only part of Finding 6, and the only Finding, challenged by the Government. The Seventh Circuit's Opinion says on page 12: "It is undoubtedly true that, while attorney Travis was in the Probate Court proceeding, he presented a genuine defense to the plaintiff's complaint."[1]

By falsely representing that petitioner was relying upon the March 21 entry which defaulted Mrs. McClenon as the final judgment in the case (both the Government and the petitioner had stipulated that the earlier February 21, 1952 entry was the judgment of the Probate Court) the Seventh Circuit held that since Mr. Travis had withdrawn his appearance at the request of his own client three days before the March 21 entry, that the proceeding was not adversary at the time of final judgment. This issue had not been raised by either party.

Mr. Travis had filed his motion for new trial in the meantime, clearly indicating that Mr. Travis was treating the February 21 entry as at least a finding of the terms of final judgment. This also creates a presumption that the sole purpose of Mr. Travis' client in asking him to withdraw was to prevent the taking of an appeal. The February 21 judgment and the March 21 entry were identical in terms except for an entry of default in the later one, for which the necessary findings appear in the earlier. Both determined the question of tax apportionment in identical language.

REASONS FOR GRANTING THE WRIT

1. Testamentary Directions Control.

In reversing the District Court and failing to give effect to the judgment of the Probate Court, the Seventh Circuit

[1] Travis did not withdraw, at the request of his own client, until March 18, 1952.

in this case decided an important question of Indiana law in a way that conflicts with two Indiana statutes. The question was whether the directions to petitioner to pay federal estate and Indiana inheritance taxes out of the residuary estate, which directions appear in Item I and Item V, 10 of the will, remain controlling as to marital deduction property after the widow elects to take against the will.

Burns Indiana Statutes Annotated, 1933 ed., 6-2334[1] answers this question in the affirmative by providing that a widow's election to take against a will does not change the will except as to provisions made for her and does not deprive her of her other interests in the estate under the laws of Indiana. In view of this statute, the decision of the Seventh Circuit conflicts with *Piersol* v. *Hays*, 113 Ind. App. 214, 79 N. E. 2d 838, which held that an executor's administration of an estate extends to property which does not pass under the will and with *Schori* v. *Stephens*, 62 Ind. 441, which holds that a state court's judicial construction of a will is a rule of property law which is binding on those who are not parties.

In view of the provisions of Burns 6-2334, that a widow's renunciation affects only the testamentary provisions for her and does not affect administrative directions to the executor, the Seventh Circuit's decision here is in conflict with the binding effect accorded testamentary directions for the payment of taxes by the Court of Appeals of the Tenth Circuit in *Thompson* v. *Wiseman* (C.A. 10, 1956) 233 F. 2d 734.

The Seventh Circuit's decision also conflicts squarely with the Indiana statute, Burns 6-1907,[2] which provides that directions in a will to pay a debt from a certain part of the estate are valid and controlling.

The Seventh Circuit's decision also conflicts with the Indiana Statute, Burns 6-2313,[3] as interpreted in *Mansur* v.

[1] Appendix, page 74. Accord: Commerce Union Bank v. Albert (1957), Tenn. 301 S. W. 2d 352.

[2, 3] Appendix, page 73.

Hinkson, 94 Ind. 395 at 402. The statute gives the widow who elects against her husband's will one-third of his real estate in fee, free of all debts if, as in our case, the personal property is adequate to pay the debts. Here the Government recognized that the widow got $4,333.33 in real estate value in fee, but it deducted from the widow's share of personal property one-third of the total tax, without excluding the federal estate tax on the real estate.[1] Thus the Seventh Circuit has required the widow to pay one-third of the federal estate taxes on real estate, contrary to her right to get her real estate free of debts.

2. Widow's Rights Depend Upon Will and Intestacy.

The Seventh Circuit erroneously held that:

> "The Illinois law in respect to a renunciation by a widow is the same as the Indiana law . . ."[2]

Under *Northern Trust Company* v. *Wilson*, 344 Ill. App. 508, 101 N. E. 2d 604, 606 an Illinois widow who renounces her husband's will is restricted to the rights given her by the statute which provides for renunciation. Thus, the decision of the Seventh Circuit is contrary to the Indiana statute, Burns 6-2334, discussed above, and to a long line of Indiana Supreme Court decisions culminating in *Rocker* v. *Metzger* (1908) 171 Ind. 364, 86 N. E. 403 and *Cassidy* v. *Padgett* (1934) 99 Ind. App. 239, 190 N. E. 133.[3]

Only three Indiana cases were relied upon in the opinion of the Seventh Circuit on this point.[4] One of them, *Cornet* v. *Guedelhoefer* (1941), 219 Ind. 200, 36 N. E. 2d 933 en-

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[1] Government's brief, page 53-54.

[2] Appendix, page 32.

[3] Other cases holding that a widow's rights exceed those given by the election statute are: *Rusing* v. *Rusing* (1865), 23 Ind. 63; *Cool* v. *Cool* (1876), 54 Ind. 225; *Dale* v. *Bartley* (1877), 58 Ind. 101; *Garrison* v. *Day* (1905), 26 Ind. App. 543, 76 N. E. 188; *Hauk* v. *McComas* (1884) 98 Ind. 460; *Morris* v. *Morris* (1899), 119 Ind. 341, 21 N. E. 918; *Tom* v. *Tom* (1940), 199 Ind. App. 599, 28 N. E. 2d 410. This rule is modified by the Probate Code of 1953, in the case of life estates bequeathed to the widow, but the code was enacted after the death of this testator.

[4] The Seventh Circuit's authorities outside Indiana are discussed in *Note On The Minority Rule*, Appendix, page 78.

forced a specific agreement of the parties as to sharing the burden of $923.23 in federal estate taxes, and recognized that an agreement "or direction in the will" would be binding on the apportionment of Indiana inheritance taxes. The other two cases[1] were decided under an Indiana statute which was repealed in 1907 by Burns 6-2334, discussed above. These two cases, moreover, involved title to particular real estate and did not purport to discuss the surviving spouse's total rights to the deceased's estate.

In none of the three Indiana cases relied upon by the Seventh Circuit did any election to take against the deceased spouse's will occur, nor was there any testamentary direction for the payment of taxes, nor was there then any federal marital deduction provision to be considered. Hence, all three decisions are wholly irrelevant to the issues in this case, except as the *Guedelhoefer* decision recognizes that provisions in a will would be binding.

3. Equitable Apportionment.

The decision of the Seventh Circuit is in direct conflict with the law of Indiana as established by *Pearcy* v. *Citizens Bank & Trust Co.* (1951), 121 Ind. App. 136, 96 N. E. 2d 918, 823, 927, which expressly adopted the Kentucky rule of equitable apportionment as the law of Indiana. *Lincoln Bank and Trust Co.* v. *Huber* [2] (1951), Ky., 240 S. W. 2d

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[1] *Clark* v. *Clark* (1892), 132 Ind. 25, 31 N. E. 461 and *Rawley* v. *Sauns* (1895), 141 Ind. 179, 40 N. E. 674.

[2] Cases holding that estate taxes should not reduce marital deduction property are: *S. C.*—Pitts v. Hamrick (C. A. 4, 1955), 228 F. 2d 487, 490; *N. Y.*—In Re Peters' Will 1949), 88 N. Y. S. 2d 142; In Re Wolf's Estate (1953), 282 App. Div. 1018, 126 N. Y. S. 2d 302; *Pa.*—In Re Rosenfeld's Estate (1954) 376 Pa. 42, 101 A. (2) 684; Babcock's Estate v. Commissioner (C.A. 3, 1956), 234 F. 2d 237, 239; *Va.*—Bayler v. National Bank of Commerce (1952), 194 Va. 1, 72 S. E. 2d 282a; *Conn.*—Jerome v. Jerome (1952), 139 Conn. 265, 93 A. 2d 139; *Ky.*—Lincoln Bank and Trust Co. v. Huber (1951), 240 S. W. 2d 99; *Cal.*—In Re Buckharts' Estate (1950), 120 Cal. App. 2d 92, 260 P. 2d 794; *Fla.* — In Re Fuchs' Estate, — Fla. —, 60 So. 2d 536; *Texas.*—Commerce Union Bank v. Albert 1957), — Texas. —, 301 S. W. 2d 352. See *Note On The Minority Rule*, Appendix, p. 78.

89 held that apportionment of the federal estate tax against marital deduction property is inequitable, since the marital deduction property is exempt from the federal tax and since the purpose of Congress in enacting the marital deduction was to permit states to approach equality of treatment with community property states.

Except for this decision of the Seventh Circuit, the federal bench has uniformly recognized the Kentucky interpretation of equitable apportionment as precluding apportionment of federal estate taxes against marital deduction property: *Babcock's Estate* v. *Commissioner* (C. A. 3, 1956), 234 F. 2d 837; *Pitts* v. *Hamrick* (C. A. 4, 1955), 228 F. 2d 487. On this question, the Seventh Circuit is thus in direct conflict with the Courts of Appeals of the Third Circuit and of the Fourth Circuit.

4. Validity of Probate Judgm

The decision of the Seventh Circuit in this case is in conflict with the decisions of this Court in *Freuler* v. *Helvering*, 291 U. S. 35, 78 L. ed. 634, and *Blair* v. *Commissioner*, 300 U. S. 5, 81 L. ed. 465, as to the binding effect of an unappealed state court decision which construes a trust document upon petition of the fiduciary when there are no decisions of higher courts of the state on the point.

The decision of the Seventh Circuit here conflicts directly with the decision of the Third Circuit Court of Appeals in *Babcock's Estate* v. *Commissioner*, 234 2d 837 and with the citation with approval in the *Babcock* case of *Weyenberg* v. *U. S.* (U. S. D. C., E. D. Wis., 1955), 135 F. Supp. 299. In the *Babcock* case, the Third Circuit held that a state court proceeding which was binding on all the parties and finally determined property rights was necessarily binding in the determination of federal estate taxes

in the absence of fraud or collusion. It further held that the proceeding did not have to be adversary in order to be binding, so long as there was no consent or collusion. In *Brodrick* v. *Gore*, 224 F. 2d 892, the Court of Appeals of the Tenth Circuit held that the burden of proving collusion which would vitiate the controlling effect of a state court decision on computation of federal estate taxes was upon the Government and held that a fiduciary was an adversary party.

The Seventh Circuit in this case has departed from the usual course of judicial proceedings in the following respects:

(a) By reversing the District Court with an opinion which wholly fails to consider the Constitutional question under the due process of law clause of the Fifth Amendment which was necessarily raised in the course of trial because of an objection by the Government and which was expressly decided in the petitioner's favor in the District Court's conclusion of law 12.[1]

(b) By falsely representing that the Petitioner agreed that the Probate Court decree would not be binding if it was entered in a non-adversary proceeding.[2] The petitioner had maintained that the Probate Court proceeding was in fact adversary, but that only fraud or collusion would vitiate its effect as a matter of law. Petitioner's brief to the Seventh Circuit had relied on the principal of law, laid down on the Third Circuit in *Gallagher* v. *Smith*, 223 F. 2d 218; and followed in *Babcock's Estate* v. *Commissioner*, 234 F. 2d 837. The Seventh Circuit dodged the issue.

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[1] Petitioner's brief, appendix, page 24; Government's brief, page 95.
[2] Appendix, page 36.

(c) By reversing the District Court on a question of fact[1] while deciding in favor of the petitioner[2] on the only issue of fact presented to the Circuit Court, namely whether the Probate Court parties had prior knowledge of or agreed or consented to the terms of the February 21, 1952 judgment of that court.[3]

(d) By considering a supplemental entry of the Probate Court as its final judgment, contrary to the signed stipulation of the Government and the petitioner in the District Court, to the action of Howard Travis, attorney for one of the probate parties, in filing a motion for a new trial to the earlier February 21 judgment, and to the law of Indiana as stated in *Smith* v. *Hill* (1921), 200 Ind. 616, 165 N. E. 911; *Heekin Can Co.* v. *Porter* (1943), 221 Ind. 69, 46 N. E. 2d 486; *Edwards* v. *Weidenhaupt* (1941), 109 Ind. App. 450, 32 N. E. 2d 106; and *H. C. Smith Coal Co.* v. *Finley* (1921), 190 Ind. 481, 131 N. E. 5. These cases hold that the final judgment is the first announced finding of the court on the issues if no later entry of judgment is intended at that time, and that a later entry is supplemental and not the final judgment.

(e) By repeating in its opinion verbatim statements from the Government's brief which were false statements of fact, finding no support in the evidence and in fact being expressly contradicted by the evidence. For example, see the Statement of the Case herein, page 13.

(f) By assuming as true matter supported only by incompetent evidence which was given no weight by the

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[1] Appendix, page 36.

[2] Appendix, page 37: "It is undoubtedly true that, while attorney Travis was in the probate court proceedings he presented a genuine defense to the plaintiff's complaint." Travis was in the case for nearly a month after the February 21, 1952 judgment, withdrawing at the request of his own client on March 18, 1952.

[3] Government's Brief, page 6.

District Court. For example, see the Statement of the Case herein, pages 13 and 14.

(g) By indulging in broad inferences favorable to the appellant (the Government) and unfavorable to petitioner as appellee, contrary to Federal Rule 52 (a), to the decision of the Court of Appeals of the Eighth Circuit in *Cashman* v. *Mason*, 166 F. 2d 693 and to the Court of Appeals of the Second Circuit in *United States* v. *Williams* (C. A. 2, 1945), 146 F. 2d 651, Certiorari denied, 324 U. S. 876, 89 L. ed. 148. For example, contrast the facts on pages 6-8 herein, with the Seventh Circuit inference that all the Probate parties, except McClenon, were non-adversary.[1]

The whole conclusion of the Seventh Circuit that a guardian *ad litem's* direction to his attorney to withdraw the attorney's appearance, after that attorney had filed a motion for a new trial, constituted retroactive consent to the terms of the Probate Court's judgment, or to any subsequent Probate entry, is an inference contrary to the duty of guardians *ad litem* under the Indiana statute, Burns' 2-1023.[2] The inference is also contrary to the natural instincts of the guardian *ad litem* to protect the interests of his own children. The inference is contradicted by express testimony quoted in the Statement of the Case on page 13. The District Court's questions showed that the guardian acted alone.[3] The District Court concluded that there was no consent, after trying the case, in which most of the testimony as to the adversary nature of the Probate Court proceedings was live testimony by witnesses who were viewed by the District Court.

5. Due Process of Law.

The Internal Revenue Code of 1939, Sections 812 (26 U. S. C. A. 812) (e) (1) (A) and (E) (1) provide that

[1] Appendix, page 38, District Court's Finding 6, pages 54-63.
[2] Appendix, page 74.
[3] Government's Brief, pages 63-64.

marital deduction property shall be reduced by *the effect* which federal estate taxes and inheritance taxes have on such property, pursuant to state law. Treasury Regulations 105, Section 81.47 C repeat this provision and specifically allow for the controlling effect of a will. Under the decision of the Probate Court here, the federal estate taxes and Indiana inheritance tax were not allowed to have any effect upon the widow's marital deduction property, because all of said taxes were paid out of the residuary estate.

This result was not appealed from, is binding on all parties and was followed in fact. Pursuant thereto, as acknowledged by the Seventh Circuit, the widow's marital deduction property in fact amounted to $334,925.59.[1]

Nevertheless, the Seventh Circuit here reversed the District Court's judgment that $334,925.59 of marital deduction should have been allowed in computing federal estate tax. This in effect affirmed the Government's contention that the marital deduction should be computed at only $280,933.55, because $64,992.04 in federal estate and Indiana inheritance taxes *should have* been apportioned against the marital deduction property under the Government's view of the law, even though in fact this apportionment did not take place.

The Seventh Circuit Court of Appeals decision thus deprives the petitioner of liberty and property without due process of law in violation of the Fifth Amendment, because it fails to apply the federal estate taxes according to the facts of each case as required by Section 812 of the Internal Revenue Code and by the decision of this Court in *Heiner* v. *Donan*, 285 U. S. 312, 78 L. ed. 772. The *Heiner* case held unconstitutional an act of Congress which con-

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[1] Appendix, page 28 and note 2a.

clusively presumed that gifts within two years of death were in contemplation of death, since it violated due process of law under the Fifth Amendment to tax without respect to the facts of each particular case.

Petitioner here is relying on rights given it by the Internal Revenue Code, Section 812, and by the clear provisions of the statutes of Indiana. The imposition of the tax by the Seventh Circuit on a computation which is contrary to these statutes and the facts of this case denies the petitioner its liberty to be free from taxation without representation, and its property as trustee in the amount of approximately $26,000.00 (including interest to date), which the District Court had ordered refunded.

The Seventh Circuit is here taxing the estate as though property which the Seventh Circuit admits passed to the widow and can qualify for the marital deduction had passed to some part of the estate which was subject to federal estate taxation. This action violates the interpretation of the due process of law clause of the Fourteenth Amendment by this Court in *Hoeper* v. *Tax Commission*, 284 U. S. 206, 76 L. ed. 248, which held that a Wisconsin progressive income tax which taxed the combined income of a husband and his wife to the husband as though it were his, violated due process of law and equal protection of the law, since it was discriminatory treatment of the taxpayer. In *Bolling* v. *Sharpe*, 347 U. S. 497, 98 L. ed. 884, this Court has recently held that the due process of law clause of the Fifth Amendment is identical with the due process of law clause of the Fourteenth Amendment on a question of discriminatory treatment.

CONCLUSION

It may not make much difference in the Eternal Scheme of things whether or not the District Court's judgment is

restored and the Government returns about $26,000.00 (including interest) which it wrongfully took from the residuary trust of which testator's orphaned grandchildren are the principal beneficiaries. But estate taxation which is contrary not only to Indiana property law but also to the financial realities violates "our American ideal of fairness."[1] Taxation imposed so clearly contrary to specific acts of Congress and controlling statutes of the Indiana General Assembly is taxation without representation. The Seventh Circuit's capricious reversal thus deprives petitioner, without due process of law, of the fundamental liberty for which the Independence of this Republic was won.

For the reasons set forth above it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

RALPH B. GREGG,
Attorney for Petitioner.

Of Counsel:
ARTHUR H. NORTHRUP.

APPENDIX

THE OPINION OF THE SEVENTH CIRCUIT RENDERED JUNE 20, 1957, IS AS FOLLOWS:

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Plaintiff sued defendants in the district court for a refund of a payment made to the defendant Campbell, covering an estate tax net deficiency (and interest thereon) assessed against the estate of Guy E. Street, who died August 16, 1950 and whose will was probated in the Probate Court of Marion County,

[1] *Bolling* v. *Sharpe* 347 U. S. 497, 499, 98 L. ed. 884, 886.

Indiana. Plaintiff is the executor and trustee under said will and is also referred to herein as the taxpayer.

We now state facts, as stipulated by the parties, or otherwise shown by the record before us, and as found by the district court.

By his will, deceased left certain personal property to his wife, other personal property to his daughter, and made specific bequests to four relatives. The rest of his estate by Item V of the will was placed in trust, 2% of the principal to be distributed during a ten year period to his wife, daughter and other beneficiaries in named percentages; and the income of the trust to be distributed to various beneficiaries, including 4/10 to his wife for life, at her death to their daughter, and at her death to grandchildren; the trust to continue for the lives of the various beneficiaries, the principal of the trust to be then distributed as provided in the will. The will provided, in part:

"Item I.

> I direct that all federal estate and state inheritance and estate taxes that may be assessed upon my estate or payable by any beneficiary thereof on account of the provisions hereof made in their behalf be paid from and out of my residuary estate.

Item V

> • • • 10. My Trustee is specifically authorized and empowered: • • • to apply the principal of the trust estate to the payment of any and all inheritance, estate, succession or other taxes, State or Federal, levied or assessed against my estate or any beneficiary thereof by reason of the transfers herein; • • •."

On February 14, 1951, the widow renounced the provisions made for her in the will and elected to take under the laws of descent of Indiana, reserving, however, her interest in life insurance policies of which she was beneficiary, her rights as surviving tenant by the entirety in certain real estate and all right, title and interest in prop-

erty as to which decedent died intestate. The document containing her renunciation also stated, in part:

> "It is not intended hereby and I do not release the Executor under the last will and testament of the said decedent and his estate from existing obligations to make payment of all federal estate taxes imposed upon any and all property hereinabove referred to, and all state inheritance and estate taxes."

In a proceeding for construction of the will and for instructions filed by the taxpayer in the Marion County Probate Court, the widow, heirs, legatees and beneficiaries of the trust were named as defendants, and proceedings were had, terminating in a decree directing, *inter alia*, the executor to pay all federal estate taxes and all inheritance taxes assessed by the United States, the state of Indiana or any other state, by virtue of the death of decedent or any transfer made by him, and not to receive reimbursement from any person. The United States was not a party to the probate court proceeding.[1]

In an estate tax return filed by the executor on November 16, 1951, a marital deduction[2] to the widow as sur-

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[1] While the Marion County Probate Court entered a decree in favor of the taxpayer, that decree is under attack by defendants herein, who contend that that proceeding was for the express purpose of seeking the avoidance of a portion of federal estate taxes due from the estate, and that it cannot be considered an adversary proceeding. The effect of that decree will be hereinafter considered.

[2] 26 U.S.C.A. §812, provides, in part, as follows:

"Sec. 812. Net estate.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * *

(e) Bequests, etc., to surviving spouse

(1) Allowance of marital deduction

(A) In general. An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

* * *

(E) Valuation of interest passing to surviving spouse. In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection—

(i) there shall be taken into account the effect which a tax imposed by this chapter, or any estate, succession, legacy, or inheri-

viving spouse was claimed. The commissioner of internal revenue determined that the marital deduction should be $280,933.55, which was computed by deducting from the amount of $344,925.59[2a] (an adjusted value of property passing to the widow) the amounts of federal estate tax ($53,770.01) and state inheritance tax ($10,222.03) applicable to the property involved. The net assessed deficiency resulting from this and other adjustments not here in issue, and amounting to $19,266.51, plus interest of $3,064.67, or a total of $22,331.18,[3] was paid to the district director on July 15, 1954. The claim for refund was filed and rejected.

The district court entered judgment in favor of the taxpayer on September 24, 1956, from which defendants appealed.

1. Defendants in this court argue in support of this proposition:

> "The marital deduction claimed by the estate for the value of property passing to the widow was properly reduced by the Commissioner by the portion of the Federal estate tax and State inheritance tax attributable to this property."

Counsel for both sides rely on *Riggs* v. *Del Drago*, 317 U.S. 95. The court in that case held that the federal estate tax should be paid out of the estate as a whole. It also

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tance tax, has upon the net value to the surviving spouse of such interest; and
* * *

(3) Definition. For the purposes of this subsection an interest in property shall be considered as passing from the decedent to any person if and only if—
(A) such interest is bequeathed or devised to such person by the decedent; or
(B) such interest is inherited by such person from the decedent; or
* * *
(G) such interest consists of proceeds of insurance upon the life of the decedent receivable by such person.
* * *"

[2a] In this court there is no dispute as to the correctness of this figure.

[3] No question has been raised as to the mathematical accuracy of the computations which produce these figures.

held that the applicable state law as to devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax. In *Riggs* v. *Del Drago*, § 124 of the New York Decedent Estate Law[3a] was upheld because it was found not to be in conflict with the federal estate tax law, 26 U.S.C.A. § 800, *et seq.*

We must, therefore, ascertain and apply the law of Indiana to the questions presented on this appeal. On that subject we have the assistance of counsel, who have discussed that law in their briefs.

By renouncing the will, and electing to take under the Indiana laws of descent, the widow received one-third of the estate after payment of debts.[4] Indiana has no statute for apportionment of federal estate taxes.

[3a] N. Y. Decedent Estate Law, Consol. Laws, Ch. 709, § 124.
This section provides in effect that, except as otherwise directed by decedent's will, the burden of any federal death taxes paid by the executor or administrator shall be spread proportionately among the distributees or beneficiaries of the estate.

[4] Burns Indiana Statutes, Ann. (1933 ed.), Vol. 3, § 6-2313 provides:

"Widow.—If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors: Provided, however, That where the real estate exceeds in value ten thousand dollars ($10,000), the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars ($20,000), one-fifth only, as against creditors."

§ 6-2319 thereof, provides:

"Widow's interest in personal estate.—If a man die testate leaving a widow, one-third of his personal estate shall descend to said widow, subject, however, to its proportion of the debts of said decedent: Provided, however, That nothing in this act shall be construed to reduce the interest which the law now gives a widow in the estate of a deceased husband: And provided, further, That such widow may elect to take under the will of said decedent instead of this or any other law of descent of this state, which election shall be made within ninety (90) days after said will has been admitted to probate in this state, and in the same manner as widows are now required by law to elect."

§ 6-2334 provides:

"Election—How made.—Any surviving husband or wife desiring to renounce the provisions made for him or her in any such will shall file his or her election in writing, * * *. In such election, such husband or wife shall state that he or she renounces the provisions made for him or her in such will and that he or she elects

The language of testator's direction in Item I, pertaining to the payment of federal estate and state inheritance and estate taxes "that may be assessed upon my estate or payable by any beneficiary thereof on account of the provisions hereof made in their behalf * * *", includes, not only that property which the testator intended to transmit by his will, but also such property as the insurance policies involved in this case, and intestate estate. It can hardly be denied that intestacy embraces not only property which the decedent failed to mention in his will but also that property which passed as intestate upon the widow's renunciation of the provisions made in the will for her. All of this property—life insurance, property passing by the will, and property passing under the laws of intestacy of Indiana—was subject to federal estate taxes. As to all of these classes of property the duty devolved upon the executor, by virtue of Item I, to pay the federal estate and state inheritance taxes because they were assessed upon the decedent's estate. Accordingly they were paid by the executor. In so doing it was required of it that such payments be made "from and out of my residuary estate."

In renouncing the provisions made for her in the will, the widow attempted to retain the benefit which would have inured to her under Item I. This she could not do under the law of Indiana, because the provisions made in the will for the widow were in lieu of her statutory rights in the estate. She may not take both. In *Clark* v. *Clark*, 132 Ind. 25, 31 N.E. 461, at 462, the court said:

> "* * * Such a contention would be in the face of all the authorities by which wills are construed and enforced. * * *"

In *Rawley* v. *Sanns*, 141 Ind. 179, 40 N.E. 674, at 676, in speaking of a surviving husband, the court said:

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to take the interest in such estate that is given to him or her under the laws of descent of the state of Indiana. After making such election, such husband or wife shall receive none of the provisions made for him or her in such will."

"• • • The law cast on him absolutely one-third of both the real and personal property owned by his wife at her death, and no more. Burns' Rev. St. 1894, § 2642 (Rev. St. 1881, § 2485); Burns' Rev. St. 1894, § 2649 (Rev. St. 1881, § 2488). This he could take against her will, or any will she might make. But, as against such a will, he could take no more than such one-third. He could not, as we have seen, take the the one-third absolutely, and take the use, rents, issues and profits of the other two-thirds, or a life estate therein."

That which passed to the widow at the death of her husband became subject to federal estate taxes, inasmuch as testate as well as intestate estate passing to a widow was subject to the classes of claims listed by the Indiana statute.[5] It was said in *Cornet* v. *Guedelhoefer*, 219 Ind. 200, 207, 36 N.E. 2d 933, 935, that, "In order to confirm the rights of the heirs or of beneficiaries of a will, it is essential that those obligations of the decedent or of his estate which by law are made superior claims against the assets, shall be paid or otherwise settled." The court referred to the classes of claims listed in the statute, the fourth class being taxes accrued upon the real and personal estate of the deceased at his death, and taxes assessed upon the personal estate during the course of administration. In that case both federal estate and state inheritance taxes

[5] § 6-1301 Burns' Statutes of Indiana, 1933.

"Unless otherwise provided in this act, the debts and liabilities of a decedent, shall, if his estate be solvent, be paid in the following order of classes:

First. The expenses of administration.

Second. The expenses of the funeral of the deceased.

Third. The expenses of his last sickness.

Fourth. Taxes accrued under the real and personal estate of the deceased at his death, and taxes assessed upon the personal estate during the course of the administration.

Fifth. Debts secured by liens upon the personal and real estate of the decedent, • • •

Sixth. A sum not exceeding fifty dollars ($50.00) for wages due any employee for work and labor performed for the decedent within two (2) months prior to his death.

were involved. Referring to the various classes of claims, including the fourth class, the court (219 Ind. at 208, 36 N.E. 2d, at 936) stated: "We summarize the items which under the seven clauses of the statute must be paid before legacies * * *." In the summary the court included the federal estate tax.[6]

The Illinois law in respect to a renunciation by a widow is the same as the Indiana law. Therefore *In re Estate of Donovan*, 409 Ill. 195, 98 N.E. 2d 797 is helpful in considering the effort of the widow in the case at bar to retain a benefit under Item I. In that Illinois case, at 202, the court said:

> "* * * The rights of a surviving spouse who clearly renounces provisions of a will made in his or her behalf become fixed by the statute and are not affected by claiming or omitting to claim any specific estate upon renunciation. (*Davis* v. *Mather*, 309 Ill. 284; *Gullett* v. *Farley*, 164 Ill. 566.) * * *"

A similar view was taken in *In re Uihlein's Will*, 264 Wis. 362, 59 N.W. 2d 641, which, on the facts, is directly in point in this case. The court, 264 Wis. at 377, 59 N.W. 2d at 649, said:

> "* * * In electing to take under the law she is not entitled to claim the benefit of the provision directing payment of federal estate taxes out of the residue. Such clause of the will remains effective as between the recipients of specific legacies and the remaindermen who take the residue, but the widow's renunciation of the will prevents such clause from being operative so as to relieve her share from the impact of the federal estate tax."

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[6] While we might have differently interpreted the limited language of the Indiana act describing the kind of taxes therein referred to (especially in view of the historical fact that it was enacted in 1881, when estate and inheritance taxes were unknown), we have no right to do so and, therefore, we accept the meaning given to the act by the Indiana court. The Indiana legislature cleared up this matter in 1953 by substituting for § 6-1301, a revision known as "§ 7-809" (Burns' Indiana Statutes, 1953 replacement). Paragraph 4 thereof reads as follows:

"All debts and taxes having preference under the laws of the United States."

We, therefore, determine, pursuant to Indiana law, that the ultimate impact of the federal estate tax fell on the residuary estate, including the part of the estate passing to the widow as intestate property, and the insurance policies. The effect thereof is to reduce the marital deduction herein to $280,933.55. It follows therefore that the claim for refund was properly rejected.[7]

2. Plaintiff relies upon the decree of the Marion County Probate Court and states that the proceeding in that court was sharply adversary in form and in fact, and was clearly not collusive. It also argues that the probate court decree was not a consent decree or one obtained by collusion. It contends that the burden is on defendants to show consent, collusion or fraud. It relies on finding 6 by the district court, which reads:

> "There is no evidence * * * that there was any agreement or consent among the parties or any of them as to the substance of any part or all of the Probate Court's judgment so entered. Said Civil Probate No. 4261 was a genuinely contested proceeding and the interests of the widow and the Guardian Ad Litem in particular and of the defendants in general were directly adverse to each other."

Defendants take issue with these contentions and insist that the probate court proceedings were collusive in the sense that all parties joined in the submission of the issues and sought the same decision, which would adversely affect the tax rights of the government, which was not a party to those proceedings, as we have pointed out. We must, therefore, consider the facts appearing in the record which are relevant to the issues thus raised by the parties.

The attorney for the executor and the attorney for the widow were members of the same firm of lawyers.

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[7] Both parties have discussed *Pearcy* v. *Citizens Bk. & Tr. Co.*, 121 Ind. App. 136, 96 N. E. 2d 918, rehearing denied, 121 Ind. App. 158, 98 N. E. 2d 231. We have carefully examined that case and find that it is consistent with the views herein expressed.

With the exception of several formal answers merely calling for strict proof of the allegations of the complaint, and the widow's answer which expressly consented to the relief prayed for in the complaint, the only answer to the complaint of the taxpayer in the probate proceeding was filed on behalf of William McClenon, as guardian ad litem for two minor children and unborn children of himself and decedent's daughter Ruth Gladys McClenon. In that answer as amended, McClenon's attorney, Howard P. Travis, alleged that the widow by her election had lost all her rights to any property under the will, and that she should bear her proportion of the estate and inheritance taxes and should not benefit by Item I of the will.

The probate court held an oral hearing October 23, 1951, and ordered briefs filed. After briefs were filed on behalf of the executor and the widow,[8] and while Mr. Travis was preparing an answering brief, the probate court on February 21, 1952, entered a decree adjudicating the issues in favor of the widow.

Mr. Travis, on behalf of his clients, filed a motion for new trial on March 11, 1952, alleging that the decision of the probate court was contrary to law, and that Ruth Gladys McClenon, decedent's daughter, a necessary party, was not represented at the trial and no judgment of default was entered against her, so that the decree was void as to all defendants. On March 18, 1952, at the express direction of his client, Mr. Travis withdrew the motion for new trial and also his appearance as counsel. The probate court on March 21, 1952 entered a second decree identical with the first except for an additional finding and judgment of default against decedent's daughter. According to the record before us, the defendants represented by Mr. Travis on and prior to March 18 were not represented by any lawyer after that date. Mr. Travis testified as a witness for defendants at the trial in the district court, where his testimony was to the effect that "his clients" informed him they were in accord with the

[8] The widow's brief agreed with the executor's contentions and disputed the arguments made by Mr. Travis on behalf of the guardian ad litem.

order of the probate court, that they were in agreement with the contentions advanced by the executor and the widow, and that it was not desired that he proceed further with his motion for a new trial. He also testified that the minors, for whom his client as guardian ad litem acted, were the primary residuary legatees under the will.

He also testified that, after briefs had been filed in the probate court on behalf of the executor and the widow (these two briefs were in agreement that the federal estate taxes should be paid by the executor and no portion thereof charged to the widow), he was instructed to file a brief. The brief for the widow was given to Mr. Travis on January 9, 1952. He proceeded to prepare his brief. He completed only the first nine pages thereof. In that portion he stated, in effect, that the widow was liable for her contribution to the estate for the full amount of the inheritance taxes payable on property which she received and which is taxable under the terms of the law, and in the district court he testified that, had he been permitted to do so, he would have filed a brief to that effect.

He further testified that he never knew that there was a judgment entered in the probate court until after it was entered, that he had never been shown the judgment and had never discussed it with anyone.

He further testified that he had originally been retained by Mr. McClenon to represent his two children in the probate court proceedings, and that he advised Mr. McClenon that the interests of his children were adverse to the widow, and the case was tried on that basis.

The probate court allowed Travis' law firm compensation for his services and reimbursement for his expenses incurred in procuring a bill of exceptions for use on a possible appeal from the court's decision, as requested in a petition presented to the court.

Not only in this court and in the district court did plaintiff contend that the probate court decree was entered as the result of an adversary proceeding and not by consent, but it uniformly made a similar contention in a

protest in regard to federal estate taxes filed with the internal revenue agent under date of October 17, 1952 and in a supplemental brief filed in support of said protest.[9]

In view of the contentions of both parties made in this court, as well as the statements heretofore made by plaintiff to the internal revenue agent, it is apparent that both sides agree that, if the probate court final decree was entered by consent of the parties or in a nonadversary proceeding, it is not binding upon defendants in this federal estate tax litigation. It is, therefore, unnecessary for us to pass upon the validity of that proposition of law and we are relieved of any obligation to consider and reconcile a number of seemingly conflicting federal courts of appeals cases.[10] The precise question before us is one of fact: Was

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[9] A. In the protest it said:

"Said judgment of Marion County Probate Court is binding on the Commissioner of Internal Revenue.

The United States Supreme Court has held at least twice that the Commissioner of Internal Revenue is bound by valid decisions of state courts in the absence of fraud or collusion. • • •

A judgment obtained by fraud, collusion, or agreement, does not come within the rule which has been clearly established by the cases cited above."

Plaintiff, in said protest, also said:

"The proceeding was adverse not only in form but in fact. • • • Thus the record amply discloses the impossibility of collusion, consent, or agreement, • • •."

In the protest it also stated:

"• • • Said judgment of Marion County Probate Court has established the law of the case, the time for appeal has now lapsed • • •."

B. In the supplemental brief plaintiff contended:

"• • • Under Indiana law, it cannot be maintained that the will, as construed by the court in a bona fide adversary proceeding, is not controlling."

And likewise,

"• • • the Marion Probate Court in a bona fide adversary proceeding considered the *Pearcy* case [*Pearcy* v. *Citizens Bk. & Tr. Co.*, 121 Ind. App. 136, 96 N. E. 2d 918] and held it irrelevant to the facts of the Street case."

It further contended:

"• • • In the face of a decision by the Marion Probate Court which establishes this as the law of Indiana, following a bona fide adversary proceeding, it simply cannot be reasonably maintained that such was not the law of Indiana, • • •."

[10] *Pitts* v. *Hamrick*, 228 F. 2d 486; *Brodrick* v. *Gore*, 224 F. 2d 892; *Gallagher* v. *Smith*, 223 F. 2d 218; *Wolfsen* v. *Smith*, 223 F. 2d 111; *Newman* v. *C.I.R.*, 222 F. 2d 131; *Channing* v. *Hassett*, 206 F. 2d 514; *Saulsbury* v. *U. S.*, 199 F. 2d 578; *Falk* v. *C.I.R.*, 189 F. 2d 806; *Burton* v. *Bowers*, 172 F. 2d 429; *Daine* v. *C.I.R.*, 168 F. 2d 449; *Loggie* v. *Thomas*, 152 F. 2d 636; *Stwell* v. *C.I.R.*, 149 F. 2d 765; *Doll* v. *C.I.R.*, 149 F. 2d 239; *Eisenmenger* v. *C.I.R.*, 145 F. 2d 103; *Nashville Trust*

the entry of the final decree of the probate court, to the extent that it affects federal estate taxes, the result of a genuine contest in an adversary proceeding or was it the result of consent of the parties in a nonadversary proceeding?

Although we have hereinbefore referred to a finding of fact made by the district court on this subject, we are not prevented by Rule 52 (a) of the Rules of Civil Procedure[11] from overriding that finding if it is clearly erroneous. Most of the evidence received in the district court is documentary. There is no conflict in the oral testimony and no question as to the credibility of witnesses. We are, therefore, not prevented by Rule 52 (a) from determining the crucial question of fact presented on this record.

It is undoubtedly true that, while attorney Travis was in the probate court proceeding, he presented a genuine defense to plaintiff's complaint. He found on his side of the table another defense counsel, who was a member of the same firm that appeared for plaintiff in that proceeding. The answer which Mr. Travis filed for the guardian *ad litem* for minor and unborn persons, clearly set forth the law of Indiana, to the same effect as we have set it forth herein. He did not receive the brief of the widow's attorney until January 9, 1952, which was about 2½ months after the trial ended on October 23, 1951. Upon its receipt, Mr. Travis started the preparation of his answering brief but he learned that shortly thereafter a decree in favor of the plaintiff had been entered. To set aside that decree, Mr. Travis, when he learned of its entry, made a motion for a new trial, calling attention to the fact that a necessary defendant, who had been served with process, had not been defaulted and had not been represented by counsel, thus rendering the decree vulnerable. Up to that

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Co. v. *C.I.R.*, 126 F. 2d 148; *Plunkett* v. *C.I.R.*, 118 F. 2d 644; *Helvering* v. *Rhodes Estate*, 117 F. 2d 509; *First Mechanics Nat. Bank* v. *C.I.R.*, 117 F. 2d 127; *Robbins* v. *C.I.R.*, 111 F. 2d 828; *Brainard* v. *C.I.R.*, 91 F. 2d 880.

Cf. *Morgan* v. *C.I.R.*, 309 U. S. 78; *Sharp* v. *C.I.R.*, 303 U. S. 624, reversing 91 F. 2d 802; *Blair* v. *U. S.*, 300 U. S. 5; *Freuler* v. *Helvering*, 291 U. S. 35.

[11] 28 U.S.C.A. Rule 52(a).

point the proceeding was genuinely contested by Mr. Travis, and by him only. Until then the intention of all other parties to make it nonadversary was impeded by a conscientious lawyer's loyalty to his client. However, he thereupon was directed by his client to withdraw the motion for a new trial as well as his appearance as counsel, both of which he, of course, did. Then, three days later, the decree which we are now considering was entered. It defaulted the defendant who had theretofore been overlooked, but, in other respects, was a copy of the vacated decree. From the time that Mr. Travis withdrew from the case until the final decree was entered, no lawyer represented the minors or the unborn persons. When the final decree was entered, their resistance, based on the established law of Indiana, had already been smothered and made inoperative. Their attorney, who had made preliminary preparation for an appeal to a higher state court, was by his discharge prevented from perfecting the appeal and, therefore, no appeal was actually taken.

On this state of the record, when the decree was entered, it was, according to plaintiff, binding upon the United States of America, although it was not a party to the proceeding and, therefore, plaintiff maintains that federal estate taxes in a substantial amount cannot be collected from plaintiff.

On these undisputed facts, we hold that, when the decree relied upon by plaintiff was entered by the probate court, insofar as it affected federal estate tax liability, it was consented to by all parties except two minors and unborn persons, who were incapable of giving consent and who were not then represented by counsel. When the decree was entered the proceeding was undefended and was nonadversary.

For the reasons hereinbefore set forth, the judgment from which this appeal was taken is reversed.

JUDGMENT REVERSED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

The judgment of the Seventh Circuit was rendered Thursday, June 20, 1957. Without the caption and formal parts it reads as follows:

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration thereof, it is ordered and adjudged by this court that the judgment of said District Court in this cause appealed from be, and the same is hereby, REVERSED.

On Tuesday, August 6, 1957 the Seventh Circuit entered an order which, without its formal parts, reads as follows:

It is ordered by the court that Appellee's Petition for Rehearing of this cause be, and the same is hereby, DENIED.

The District Court on September 24, 1956 entered its special findings of fact and separate conclusions of law as follows:

This cause came on for trial without a jury and the Court, having heard the evidence and considered the Stipulation of the parties, specifically finds the facts and makes separate conclusions of law as follows:

SPECIAL FINDINGS OF FACT

Finding No. 1

Plaintiff is a National Banking Association with its principal office at 11 South Meridian Street, Indianapolis 4, Marion County, Indiana, and is organized and existing under the laws of the United States of America. Plaintiff is the successor to The Indiana Trust Company by virtue of a consolidation of said Trust Company into said plaintiff on September 30, 1953, under Section 34 (a) of Title 12 of the United States Code. Plaintiff brings this action in either or both of its fiduciary capacities as executor and trustee under the will of Guy E. Street, deceased.

Finding No. 2

Defendant, United States of America, has jurisdiction over plaintiff and is empowered to collect an estate tax by virtue of the laws of said United States. Ralph W. Cripe was the former Collector of Internal Revenue at Indianapolis, Indiana, and was charged with the responsibility of collecting the estate tax on the estate of Guy E. Street, deceased, at all times prior to October, 1952. Defendant, Gary Campbell, is District Director of Internal Revenue at Indianapolis, Indiana, charged with the re-

sponsibility of collecting the estate tax on the estate of Guy E. Street, deceased, at all times since October, 1952.

Finding No. 3

Guy E. Street died testate, a resident of the City of Indianapolis, Marion County, Indiana, on the 16th day of August, 1950. Said Guy E. Street's last will and testament was duly probated on August 24, 1950, and recorded in Will Record VVV, page 196, in the records of the office of the Clerk of the Probate Court of Marion County, Indiana. Said will reads as follows:

LAST WILL AND TESTAMENT OF GUY E. STREET

I, Guy E. Street, a resident of the City of Indianapolis, County of Marion, State of Indiana, make, publish and declare this as my last will and testament, hereby revoking all wills by me heretofore made.

Item I

I direct that all federal estate and state inheritance and estate taxes that may be assessed upon my estate or payable by any beneficiary thereof on account of the provisions hereof made in their behalf be paid from and out of my residuary estate.

Item II

I give and bequeath unto my daughter, Ruth Gladys McClenon, my personal automobile, all of my jewelry and all of my furniture now in storage commonly known as the "Parkersburg furniture"; and to my wife, Anna L.

Street, I give and bequeath all of my household furniture and remaining personal effects, including my automobile that she heretofore customarily drove. If my wife shall predecease me, the bequests herein made to her shall go to my daughter; and if my daughter shall predecease me, the bequests herein made to her shall go to my wife.

Item III

My wife and I hold our residence at 5702 N. Pennsylvania Street, Indianapolis, Indiana, properties on Pershing Avenue and Warman Avenue in said City and a farm in Grant County, Indiana, as tenants by the entireties. If my wife shall predecease me and I become the sole owner of said real estate, then I give, devise and bequeath all of said real estate in this item referred to, to The Indiana Trust Company of Indianapolis, Trustee under Item V of this will; conditioned, nevertheless, that my daughter, Ruth Gladys McClenon, shall have the right throughout her lifetime to occupy said residence at 5702 North Pennsylvania Street, Indianapolis, Indiana, so long as it shall be her wish so to do, without paying any rent or charge therefor, and the expense of taxes, upkeep and insurance on said property to be borne by said Trustee; and conditioned further, that my brother, Arthur J. Street, shall have the right throughout his lifetime to live on and operate said farm in Grant County, Indiana, so long as he shall wish without paying any rent or charge therefor, and with the expense of taxes, insurance and upkeep on the improvements on said real estate to be borne by my Trustee.

Item IV

I give and bequeath to Ersie (Mrs. W. J.) Dent of Parkersburg, West Virginia; Cora (Mrs. Arthur J.) Street and Aries Street, both of Grant County, Indiana;

Betty Street Ferguson of Indianapolis, Indiana; and Gladys (Mrs. Ernie) Bahel of Detroit, Michigan, the sum of Two Thousand ($2,000.00) Dollars each. If any one of said beneficiaries shall predecease me, the said bequest of $2,000.00 herein made to her shall lapse and shall become a part of my residuary estate.

Item V

All of the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever kind and character and wheresoever located, including lapsed legacies and contingent devises and bequests in the prior Items of this will, and including all proceeds of insurance policies in which my estate or personal representatives are named as ultimate beneficiaries, but after first paying from my estate all of my debts and obligations and all taxes as hereinabove provided, I give, devise and bequeath to The Indiana Trust Company of Indianapolis, Indiana, Trustee, in trust nevertheless, to own, hold, manage, control, invest and reinvest and to make payment of the income therefrom and distribution of the principal thereof, upon the trusts, with the powers and subject to the limitations following, viz.:

1. My Trustee shall set aside from the principal of my trust estate each year for a term of ten (10) years, beginning with the date of my death, a sum equal to two (2%) percent of the original net estate which comes into its hands, which said sum so set aside in each such year shall be distributed by my Trustee as follows:

a. An amount equal to four-tenths (.4) thereof shall be paid to my wife, Anna L. Street, in each year throughout said ten year period, if she shall survive me and shall so long live.

b. An amount equal to three-tenths (.3) thereof shall

be paid to my daughter, Ruth Gladys McClenon, in each year throughout said ten year period if she shall survive me and shall so long live;

c. An amount equal to one-tenth (.1) thereof shall be paid to my brother, Arthur J. Street, in each year throughout said ten year period if he shall survive me and shall so long live.

d. An amount equal to one-tenth (.1) thereof shall be paid to my sister-in-law, Gladys Bahel, in each year throughout said ten year period if she shall survive me and shall so long live; and

e. An amount equal to one-tenth (.1) thereof shall be paid to such person or persons as I shall by a codicil to this my last will and testament hereafter specify; and in default of such specification by such codicil, said one-tenth of said sum shall lapse and shall become a part of the principal of my trust estate and disposed of as part of the trust created by this Item of my will.

If any of said beneficiaries above or in said codicil shall predecease me or shall die before the expiration of said ten year period, the remaining percentage installments thereafter falling due shall lapse and shall be returned into the principal of my trust estate, but this shall not affect the amounts payable in each of said ten years to the remaining beneficiaries named in Paragraphs a to e (and the codicil referred to in e), inclusive, of Clause 1 of this Item of this will, the sums payable to said remaining beneficiaries to continue at the respective percentages of the amount to be determined in each year as aforesaid.

2. Four-tenths (.4) of the annual net income from my trust estate shall be paid by my Trustee to my wife, Anna L. Street, if she survives me, for and during the term of her natural life, and upon her death said four-tenths of

said income shall be paid to my daughter, Ruth Gladys McClenon, if she survives her mother, for and during the term of her natural life and upon her death said four-tenths of said income shall be paid in equal shares to and among, if there be more than one, the child or children of my said daughter and to their issue per stirpes, and in default of issue to the survivor of them until the time hereinafter fixed for the termination of this trust.

3. Three-tenths (.3) of the annual net income from my trust estate shall be paid by my Trustee to my said daughter, Ruth Gladys McClenon, if she survives me, for and during the term of her natural life and upon her death said three-tenths of said income shall be paid:

a. One-half thereof to her husband, William McClenon, if he survives her, for and during the term of his natural life; and

b. The remaining one-half thereof, and upon the death of the said William McClenon all thereof, in equal shares to and among, if there be more than one, the child or children of my said daughter and to their issue per stirpes, and in default of issue, to the survivor of them until the time hereinafter fixed for the termination of this trust.

4. One-tenth (.1) of said annual net income from my trust estate shall be paid by my Trustee to my brother, Arthur J. Street, if he survives me, for and during the term of his natural life and upon his death shall be paid to his wife, Cora Street, if living, throughout her lifetime.

5. One-tenth (.1) of said annual net income from my trust estate shall be paid by my Trustee to my sister-in-law, Gladys Bahel, if she survives me, for and during the term of her natural life, and upon her death shall be paid to her husband, Ernie Bahel, if living, throughout his lifetime.

6. The remaining one-tenth (.1) of the annual net income from my trust estate shall be paid by my Trustee, when it shall be directed by my sister Ersie Dent so to do and not otherwise, to my brother, Ealy Street, if he survives me, for and during the term of his natural life. In any given year in which my Trustee is directed not to make said percentage payment of income to my said brother, said percentage payment for said year shall be added to the amounts paid to the remaining beneficiaries named in this Item of my will. I make this conditional provision with respect to payments to my said brother because of the fact that he is a member of an Order or House with or among whom he may or may not be living from year to year, and if and when so living will not be in need of said income. If my said sister Ersie Dent should predecease my said brother, then the power and discretion hereinabove vested in her with respect to the direction of income payments to my brother shall be and become vested in my Trustee.

7. When and as the beneficiaries named in Paragraphs numbered 4, 5, and 6 respectively of this Item of my will shall die, then the percentage of annual net income of my trust estate theretofore paid them respectively according to said Paragraph shall be paid in equal shares to and among, if there be more than one, the child or children of my said daughter, Ruth Gladys McClenon, and their issue per stirpes, and in default of issue to the survivors of them, until the time hereinafter fixed for the termination of this trust.

8. This trust shall continue throughout the lives of my wife, Anna L. Street; my daughter, Ruth Gladys McClenon; her husband, William McClenon; my brother Arthur J. Street; his wife, Cora Street; my sister-in-law, Gladys Bahel; her husband, Ernie Bahel; my brother, Ealy

Street; my sister, Ersie Dent; my grandson, Guy Scott McClenon; such other children of my daughter, Ruth Gladys McClenon, as may be hereafter born to her and are living at the time of my death; and Paul Ferguson (son of said Betty Ferguson), and this trust shall terminate upon the death of the survivor of said persons, at which time the principal thereof then remaining undistributed shall be paid over and distributed by my Trustee in equal shares to and among, if there be more than one, the child or children of my daughter, Ruth Gladys McClenon, and among their issue per stirpes, and in default of issue among the survivor or survivors of them; provided, however, that upon my said grandson, Guy Scott McClenon, attaining the age of forty (40) years, he shall receive distribution of fifty (50%) percent of that portion of the principal of said trust estate from which he is then receiving income payments, and thereafter and as often as portions of the principal of said trust estate shall become freed of income payments to other beneficiaries and become available for income payments to him, fifty (50%) percent of his portion of the principal so freed shall be paid over and distributed to him. My Trustee is hereby empowered in its sole and uncontrolled discretion to make similar distributions of principal to any other sons hereafter born to my said daughter as they respectively attain the age of forty (40) years, if such ages are attained by them respectively prior to the time hereinabove fixed for the termination of the entire trust.

9. If all of the children of my said daughter and their issue shall die prior to the date for the termination of this trust as aforesaid, then the income hereinabove made available to them shall be paid to my said daughter, if living, throughout the term of her natural life, and if dead, then to my wife, Anna L. Street, if living, throughout the

term of her natural life, and if dead, then in equal shares to and among my nieces Aries Street and Betty Ferguson, for and during the terms of their natural lives respectively and to the issue of such niece as shall die, and, in default of such issue, to the survivor of them. If the said Aries Street and Betty Ferguson shall die and shall leave no issue them or either of them surviving or if leaving such issue, all thereof shall die prior to the time hereinabove fixed for the termination of this trust, then and in that event this trust shall continue in perpetuity and the income therefrom or from such portion of the principal thereof as has not theretofore been distributed in accordance with the above provisions of this will shall be paid by said Trustee to the Indianapolis Foundation as established by resolution of January 5, 1916.

10. My Trustee is specifically authorized and empowered: to receive and retain in my trust estate all property and assets thereof which originally come into its hands; to apply the principal of the trust estate to the payment of any and all inheritance, estate, succession or other taxes, State or Federal, levied or assessed against my estate or any beneficiary thereof by reason of the transfers herein; to invest the principal of the trust estate in and retain any and all types or kinds of property, real or personal. Without intending to limit the powers of the Trustee in this respect, I recommend that safety of investment, rather than a high rate of return, be given first consideration; to sell property at public or private sale, without or with notice, for cash or upon credit, with or without appraisements, and to determine the amount of and receive and receipt for the consideration therefor; to grant or take leases of property for any term or terms, with or without options to purchase, though the term extends beyond the termination of this trust; to pay premiums on insurance

against any liability, loss or hazard; to make division, allotments or distribution among beneficiaries wholly or partly in kind and for that purpose to determine the value thereof; to abandon, compromise, contest and/or arbitrate any and all claims or demands in favor of or against the trust estate; to enter into or oppose corporate mergers, consolidations, dissolutions, reorganizations, or adjustments of capital assets and/or indebtedness; to join in creditors' or protective committees and pay the proportionate cost thereof; to hold any and all securities or other properties in bearer form, in its own name or in the name of any nominee without disclosing its fiduciary relation; to determine what shall be charged or credited to income and what to principal, including ordinary and extraordinary stock dividends and liquidating dividends in cash or in kind; to make payments of principal or income directly to minor beneficiaries rather than their guardian; to vote at corporate meetings in person or by proxy; to advance or borrow money and to hold, mortgage or pledge property for its repayment; to deal with itself or any of its departments or any associated or affiliated institution, conditioned only that such dealings shall not be less favorable to the trust estate than could have been reasonably had through other responsible persons or corporations; to execute and deliver or receive any conveyances, assignments, mortgages, leases or other instruments or contracts requisite to transfer or in any manner affecting title to trust property; to make advancements to the trust estate or to any beneficiary, from time to time, in anticipation of income in order to accomplish comparative uniformity of periodical payments of income; to do all or any of the things and exercise all of the powers and discretions aforesaid without the order or approval of any Court or of any beneficiary; without limitation thereon by any of the foregoing enumerated

powers, I give and vest in my Trustee, in the retention, acquisition, management, control, investment and disposition of said trust estate, every power and authority which the owner of the complete legal and equitable title to said property could exercise.

Persons dealing with my Trustee shall not be responsible in any way for the proper application of funds or properties paid or delivered to the Trustee.

My Trustee is expressly relieved from all duties and obligations that would otherwise be placed upon it by an Act of the State of Indiana concerning accounting by Trustees, Acts 1945, Chapter 157, and all acts amendatory thereof and supplemental thereto. The powers herein vested in my Trustee shall be construed as cumulative, not as exclusive of one another nor exclusive of any powers or rights vested in my Trustee by law.

If my Trustee shall consolidate or merge with any other banking association or reorganize or reincorporate or change its name and the corporation so formed shall acquire the assets or succeed to the fiduciary business of my Trustee then the corporation so formed by such consolidation, merger or which shall so acquire the assets or succeed to the fiduciary business of my Trustee shall become Trustee hereunder with the same force and effect and with the same rights, powers, privileges, duties, discretions and limitations as if it had been originally appointed as Trustee hereunder, all without execution of filing of any further instruments on its part.

My Trustee shall maintain a separate safe deposit box for the securities of the trust and they shall be kept separate from the properties of the Trustee and of any other trust, person, firm or corporation. Separate accounts shall be kept by the Trustee and it shall render semi-annual

statements of income account and annual statements of capital account to each beneficiary for the time being entitled to share in the income and, upon final settlement, shall render a full, true and complete accounting to each beneficiary upon whom settlement is made.

Item VI

I nominate and appoint The Indiana Trust Company, of Indianapolis, Indiana, as the Executor of this my last will and testament and hereby vest in my said Executor powers, authorities and discretions identical with those hereinabove vested in my Trustee to the end that the administration of my estate may be facilitated.

In witness whereof, I have hereunto set my hand and seal this *22nd* day of November, 1946.

(S) GUY E. STREET (SEAL)

Signed, Sealed, Acknowledged and declared as and for his last will and testament by the testator, Guy E. Street, before the undersigned, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses to said last will and testament this *22nd* day of November, 1946.

Witnesses:

(S) Eugene C. Miller,
EUGENE C. MILLER.

(S) Betty L. Harrison,
BETTY L. HARRISON.

Finding No. 4

Said Probate Court of Marion County took jurisdiction of said estate on August 24, 1950 and of the trust created by said will and caused the trust to be docketed in Trust

Docket 5, page 1890, on December 14, 1950. Plaintiff qualified as executor under said will and letters testamentary were duly issued to plaintiff on August 24, 1950. Plaintiff also was confirmed by said Probate Court in its appointment as Trustee under said will on December 15, 1950. Plaintiff is now acting as and is duly qualified as executor and as trustee.

Finding No. 5

On February 14, 1951, Anna L. Street, widow of the decedent, Guy E. Street, filed in said Probate Court her renunciation of the provisions made for her in said will and her election to take under the laws of the State of Indiana, which renunciation was duly docketed in said Probate Court and reads as follows:

Anna L. Street, widow of Guy E. Street, deceased, who departed this life testate, a resident of the City of Indianapolis, County of Marion, State of Indiana, on the 16th day of August, 1950, and whose last will and testament was duly probated by the clerk of the Marion Probate Court on the 24th day of August, 1950, Order Book 231, page 428, and which probate was duly approved by the Marion Probate Court September 5, 1950, Order Book 272, page 239, and which said will is duly recorded in Will Record VVV, page 196, of the records in the office of the Clerk of Marion County, Indiana, as such widow, hereby renounce the provisions made for me in such will and hereby elect to take the interest in such estate, both real and personal, that is given to me as the surviving widow of said decedent under the laws of descent of the State of Indiana, hereby reserving nevertheless to myself all interests under insurance policies on the life of Guy E. Street, deceased, in which I am named as a beneficiary and the proceeds thereof, as well as all of my right, title and interest as a surviving

tenant by the entireties in and to real estate of which my deceased husband and myself were tenants by the entireties, wherever the same may be located, as well as my interest in all community property, real and personal, which was held by said decedent and myself prior to his death; and further reserving to myself all right, title and interest which I may have in and to all property, real and personal, of said decedent as to which he died intestate.

It is not intended hereby and I do not release the Executor under the last will and testament of the said decedent and his estate from existing obligations to make payment of all federal estate taxes imposed upon any and all property hereinabove referred to, and all state inheritance and estate taxes.

Dated at Indianapolis, Indiana, this 20th day of December 1950.

(S) Anna L. Street,
ANNA L. STREET.

STATE OF INDIANA,
County of Marion, ss:

Before me, the undersigned, a Notary Public in and for said County and State, appeared Anna L. Street, personally known to me, and acknowledged the execution of the above and foregoing instrument as her voluntary act and deed.

Witness my hand and Notarial Seal this 20th day of December 1950.

(S) BETTY L. HARRISON,
Notary Public.

My commission expires January 7, 1951.

Finding No. 6

Subsequent to the action of Anna L. Street, widow of decedent, in electing to take under the laws of Indiana, this plaintiff filed a complaint on May 7, 1951 in said Marion County Probate Court which was separately docketed as a civil matter under Civil Probate No. 4261. Said complaint sought a construction of said will and instructions and joined as parties defendant Anna L. Street, testator's widow; Ruth Gladys McClenon, testator's daughter and only child; Arthur J. Street, testator's brother with his wife, Cora Street; Gladys Bahel, testator's sister-in-law and her husband, Ernie Bahel; Guy Scott McClenon and Gladys Ann McClenon, testator's minor grandchildren; the unborn children and issue of Ruth Gladys McClenon; William McClenon, husband of Ruth Gladys McClenon; Ealy Street, testator's brother; Ersie Dent, testator's sister; Aries Street Lloyd, testator's niece; the unborn children and issue of Aries Street Lloyd; Betty Ferguson, testator's niece; Paul Ferguson, the minor child of Betty Ferguson; the unborn children and issue of Betty Ferguson and The Indiana Trust Company as Trustee for The Indianapolis Foundation, a contingent legatee under the will. These were all the heirs at law, beneficiaries of insurance, donees, surviving joint tenants, the surviving tenant by entireties, and all the legatees or devisees of testator.

Defendants' answers in said will were filed in person by Anna L. Street, Arthur J. Street, Cora Street, Gladys Bahel, Ernie Bahel, Ealy Street, Ersie Dent, Aries Street Lloyd, Betty Ferguson and The Indiana Trust Company as Trustee for the Indianapolis Foundation. An answer was also filed by Donald M. Ream, Attorney at Law, as Guardian Ad Litem on behalf of the minor, Paul Ferguson, and an answer was filed by Howard P. Travis of the firm

of Royse and Travis, Attorneys for William McClenon, Guardian Ad Litem for his own minor children, Guy Scott McClenon and Gladys Ann McClenon. Said Guardians Ad Litem had been duly appointed by the Probate Court to represent said minors in said suit.

The answers all required strict proof of the facts alleged in the complaint and the answer and amended answer of William McClenon, Guardian Ad Litem for Guy Scott McClenon and Gladys Ann McClenon, specifically denied that there was any ambiguity in Item I of the last will and testament of said testator and alleged that said Item I does not require the executor to pay inheritance or estate taxes arising from the proceeds of insurance policies or jointly on the properties which passed to the survivor by operation of law and that the share which the widow takes as against the will should be computed on the value of the net estate of the testator after all taxes and expenses had been paid including Indiana inheritance taxes and federal estate taxes and that the widow was not entitled to any income of the estate after the date of testator's death; required strict proof of the applicability of Arizona Community Property Law to the Arizona bank account and specifically alleged that there was no intestacy of the property given to the widow under the residuary clause of the will because of her election and that said will should be interpreted as if the said Anna L. Street had predeceased the testator. Finally, the amended answer requested that the word jewelry be construed to include all precious stones, watches, rings and other articles commonly believed by the general public to be included within the term jewelry.

Said Civil Probate No. 4261 was tried before the Honorable Dan V. White, regular Judge of the Marion County Probate Court, in October, 1951, in the presence of attor-

neys for Anna L. Street, widow, William McClenon, personally and as Guardian Ad Litem for Guy Scott McClenon and Gladys Ann McClenon, John A. Royse and Howard P. Travis, counsel for William McClenon personally and as such Guardian Ad Litem, the Guardian Ad Litem for Paul Ferguson and the attorney for the plaintiff therein and herein. Having received a brief from the plaintiff which was favorable to the widow except in concluding that community property law did not apply to the Arizona bank account and that the term jewelry ought to be broadly construed to include a bequest to the daughter of certain loose stones or gems and watches, the court heard opening statements from all counsel present. The case was tried without any stipulation, on documentary evidence and the testimony of witnesses who were cross-examined by the various counsel present. Objections were made and ruled on as to the admissibility of certain documentary evidence and upon cross-examination by Mr. Travis, the Indiana inheritance tax return which had been filed and the proposed federal estate tax return as subsequently filed on November 16, 1951, were introduced into evidence.

On February 21, 1951, Judge Dan V. White of said Marion County Probate Court entered judgment as follows:

In the Marion Probate Court

Estate Docket 148 Page 54363

Civil Probate No. 4261

STATE OF INDIANA,
County of Marion, ss:

IN THE MATTER OF THE TRUST UNDER THE LAST WILL AND TESTAMENT OF GUY E. STREET, DECEASED
THE INDIANA TRUST COMPANY, TRUSTEE, PLAINTIFF

v.

ANNA L. STREET, RUTH GLADYS MCCLENON, ARTHUR J. STREET, CORA STREET, GLADYS BAHEL, ERNIE BAHEL, GUY SCOTT MCCLENON, GLADYS ANN MCCLENON, UNBORN CHILDREN AND ISSUE OF RUTH GLADYS MCCLENON, WILLIAM MCCLENON, EALY STREET, ERSIE DENT, ARIES STREET LLOYDS, BETTY FERGUSON, THE UNBORN CHILDREN AND ISSUE OF ARIES STREET LLOYDS, THE UNBORN CHILDREN AND ISSUE OF BETTY FERGUSON, THE INDIANAPOLIS TRUST COMPANY, TRUSTEE FOR THE INDIANAPOLIS FOUNDATION, DEFENDANTS

ENTRY ON EXECUTOR'S AND TRUSTEE'S AMENDED COMPLAINT FOR CONSTRUCTION OF WILL AND INSTRUCTIONS

Comes now the Indiana Trust Company as Executor and as Trustee under the Last Will and Testament of Guy E. Street, deceased, and files its amended complaint for construction of will and instructions in six paragraphs in the words and figures, following, to-wit: (See Entry of May 29, 1951)

And come now the defendants Anna L. Street, Arthur J. Street, Cora Street, Gladys Bahel, Ernie Bahel, Ealy Street, Ersie Dent, Aries Street Lloyds, Betty Ferguson and The Indiana Trust Company, Trustee for the Indianapoli Foundation, and file their separate answers waving service of summons and notice of the hearing date of this proceeding and entering their voluntary appearance and consent to the relief prayed for in said complaint and petition contingent upon strict proof of the facts alleged therein except for the allegations contained in Rhetorical Paragraphs 1, 2, and 3 of Paragraph One which allegations they and each of them admitted;

And the sheriff of Marion County having served summons of the defendants Ruth Gladys McClenon, William

McClenon, Paul Ferguson, Anna L. Street, and The Indiana Trust Company, Trustee for the Indianapolis Foundation, and the sheriff of the county in which the other defendants resided having served summons upon them and all said sheriffs having made return of the said summons in the proper form showing a good and sufficient service of summons within the county on which each of said sheriffs has jurisdiction;

And it appearing to the court that Paul Ferguson, Guy Scott McClenon and Gladys Ann McClenon are minors, the court orders Donald M. Ream appointed as guardian ad litem for Paul Ferguson which order is in the words and figures, to wit: (See Entry dated June 6, 1951)

And said Donald Ream enters his answer for the defendant Paul Ferguson, denying every allegation of said complaint and requiring strict proof thereon, in these words and figures, to wit: (See Entry dated June 6, 1951)

And comes now William McClenon and files his verified petition for the appointment of a guardian ad litem for Guy Scott McClenon and Gladys Ann McClenon, alleging that as the natural father of said minors, in these words and figures, to wit; (See Entry dated June 15, 1953)

And the court orders and appoints William McClenon as guardian ad litem for Guy Scott McClenon and Gladys Ann McClenon in these words and figures, to-wit: (See Entry dated June 15, 1952) and William McClenon as guardian ad litem for said minors files his answer in these words and figures as follows, to-wit: (See Entry dated September 21, 1951) and supplementary thereto his amended answer as guardian ad litem for said minors in these words and figures, to-wit: (See Entry dated October 23, 1951)

And the case coming on for trial it is heard before Dan V. White, Judge, and Mrs. Anna L. Street is present by her attorney, Edward P. Fillion; and Mr. William McClenon is present in person and by his attorneys John A. Royse and Howard P. Travis; and Guy Scott McClenon and Gladys Ann McClenon are represented by the presence of their guardian ad litem William McClenon and said attorneys Royse and Travis; and the minor Paul Ferguson is represented by his guardian ad litem, Donald Ream; and The Indiana Trust Company is represented by its attorney, Arthur H. Northrup;

And the court having heard the testimony of Mr. Floyd Michael of The Indiana Trust Company; and having examined the deeds to the property referred to in the complaint as the Grant County Farm; and having examined a letter from Mr. Ersie Dent and having examined a certain bank statement covering the funds turned over to The Indiana Trust Company by the Valley National Bank in Tucson, Arizona; and having examined properly executed statements of the provisions of each of the life insurance policies described in the complaint; and having examined the Clerk of the Circuit Court of Marion County as to the date and provisions of the probated will of Guy E. Street, deceased, and of the date and terms of the said will be Anna L. Street; and having heard the examination and cross examination of said witnesses by counsel; and having heard the argument of the counsel on the issue raised by the complaint and the various answers thereto; and having examined briefs submitted upon the questions of law; and being duly advised in the premises; finds that the allegations of said amended complaint for construction of the will and instructions are true and that the prayer thereof ought to be granted; and it is accordingly

ORDERED ADJUDGED AND DECREED that The Indiana Trust Company, as Executor, is hereby ordered to pay all federal estate taxes and all inheritance taxes assessed by the United States, the State of Indiana or any other state, by virtue of the death of Guy E. Street or any transfer made by Guy E. Street, deceased, and The Indiana Trust Company as Executor or as Trustee is hereby ordered not to seek or receive reimbursement for any portion of said inheritance or federal estate taxes, from any person whomsoever, whether he be beneficiary of a life insurance policy, surviving joint tenant, or tenant by the entirety, heir, donee, surviving widow, assignee, legatee, devisee, cestui que trust, or other person;

That The Indiana Trust Company as Executor or as Trustee shall allow Arthur J. Street to remain on the real estate known as the Grant County Farm, deeds to which have been submitted to this court and which is more particularly described in Exhibit A which is attached to this order and made a part hereof as though it were set forth herein verbatim, throughout the lifetime of Arthur J. Street, the brother of Guy B. Street, deceased, so long as said Arthur J. Street lives on and operates said farm in Grant County; and said Indiana Trust Company as Executor or as Trustee shall pay the expenses of taxes, insurance, and upkeep in the improvements on said real estate including the 1/3 undivided interest of Anna L. Street therein so long as the possession of Arthur J. Street thereon remains undisturbed;

That the laws of community property do not apply to the sum transferred to The Indiana Trust Company from the Valley National Bank, in Tucson, Arizona, and that The Indiana Trust Company as Executor or as Trustee shall hold said amount as part of the general assets of the estate of Guy E. Street, deceased;

That the provisions made for Anna L. Street, widow of Guy E. Street, deceased, in Items II and III of the Last Will and Testament of Guy E. Street, lapse by virtue of the election of said Anna L. Street to renounce the provisions of the Will and that under the laws of the state of Indiana; that said lapsed legacies and devisees pass under Item V, the residuary clause of said will; that by renouncing, said Anna L. Street receives ½ of the interests described in the provisions made for Anna L. Street in Item V of said will and Ruth Gladys McClenon receives the other half; that the provisions of said Item V of said will are not to be accelerated; but the provisions for Mrs. Anna L. Street are to be distributed equally from time to time as provided in the will to Anna L. Street and Ruth Gladys McClenon in accordance with the laws of distribution of decedent's estate;

That the word jewelry as used by the testator in Item II of his will was meant to include loose stones and a certain ladies jeweled watch and accordingly The Indiana Trust Company as Executor has hereby ordered to make distribution to Ruth Gladys McClenon of all the items inventoried in the estate of Guy E. Street, deceased, as jewelry, gems, loose stones, or watches;

That all of the above decrees and orders of the court are to be construed as instructions to The Indiana Trust Company as Executor or as Trustee as well as judgments concerning the construction of the Last Will and Testament of Guy E. Street; and that Item I of the Last Will and Testament of Guy E. Street is construed hereby as an order to the Executor for the payment of all federal estate and state inheritance and estate taxes and that said Item I is not intended as a benefit to any one particular person nor limited to any particular type of property whether passing under the will or independently of the will; and The Ind-

iana Trust Company is hereby ordered to compute the interest of Anna L. Street which said Anna L. Street takes by virtue of her election under the laws of Indiana an undivided one-third interest in each parcel of decedent's real estate, plus rents and profits on said one-third since the date of death and one-third of the personal property of the estate of Guy E. Street, deceased, at the time of the distribution of said personal property, including the income of said one-third to the date of said distribution, but subtracting therefrom one-third of the debts and obligations, excluding federal estate and state inheritance and estate taxes which shall be paid from the residuary estate passing under item V of said will in accordance with the terms of Item I of said will;

And The Indiana Trust Company, Executor, is ordered to pay to Donald Ream, guardian ad litem of said minors, a fee of for his services and to pay William McClenon, guardian ad litem for said minors, a fee of for his services.

Dated at Indianapolis, Indiana, this 21 day of February 1952.

(Signed) Dan V. White,

DAN V. WHITE,

Judge, Marion. Probate Court.

Thereafter, on March 11, 1952, Royse and Travis, on behalf of William McClenon, filed a motion for new trial. Subsequently, on March 18, 1952, Royse and Travis withdrew their motion for new trial at the request of their client and petitioned for an allowance for fees for services for the Guardian Ad Litem which the Court allowed in the amount of $1500.00 and $22.80 for expense of preparing a partial transcript of the evidence. The Court also allowed a $500.00 fee for the Guardian Ad Litem for Paul Ferguson.

The Probate Court subsequently entered a second judgment identical with the first except for an additional finding and judgment of default against Ruth Gladys McClenon.

There is no evidence that any of the parties under Civil Probate No. 261 had prior knowledge of the terms of the judgment which the Probate Court entered on February 21, 1952 or that there was any agreement or consent among the parties or any of them as to the substance of any part or all of the Probate Court's judgment so entered. Said Civil Probate No. 4261 was a genuinely contested proceeding and the interests of the widow and the Guardians Ad Litem in particular and of the defendants in general were directly adverse to each other.

Finding No. 7

On November 16, 1951, plaintiff filed a federal estate tax return for the estate of the said Guy E. Street showing a gross estate of $999,364.71, claiming deductions exclusive of the specific exemption in the sum of $411,159.86, resulting in a net estate of $488,204.85 for tax imposed by the Revenue Act of 1926, and a net estate of $528,204.85 for tax imposed by the Revenue Act of 1932, as amended, and a total net tax of $142,043.51 after claiming credit for state inheritance taxes in the sum of $13,528.19. The returned tax of $142,043.51 was paid on November 16, 1957, to former Collector of Internal Revenue, Ralph W. Cripe.

Finding No. 8

Subsequently, a tentative audit and review of the return was made by the Office of the Internal Revenue Agent in Charge, Indianapolis, Indiana, the result of which was set forth in a letter to the executor under date of September 10, 1952. In said tenative audit the gross estate was determined to be $999,391.71. Deductions exclusive of the

specific exemption were allowed in the sum of $349,044.80, resulting in a net estate of $550,354.91 for tax imposed by the Revenue Act of 1926, and a net estate of $590,354.91 for tax imposed by the Revenue Act of 1932, as amended, and a total net tax of $177,325.22. Since the tax of $142,043.51 was paid on the basis of the return, the deficiency was tentatively determined to be $35,280.71. No credit for state inheritance taxes was allowed in this tentative audit.

Finding No. 9

A protest was filed by the executor against the tentative findings, and hearings were held in the Office of the Internal Revenue Agent in Charge and before the Appellate Division of the Cincinnati Regions of the Internal Revenue Service. No changes, however, were made and the gross deficiency was finally determined to be $35,280.71, of which the executor was informed in 90-day final audit letter dated March 5, 1954. He was advised, however, that upon submission of evidence entitling the estate to the full 80 per cent credit the net assessed deficiency would be $19,266.51. This evidence was subsequently furnished.

Finding No. 10

The net assessed deficiency of $19,266.51, plus interest theron in the sum of $3,064.67, a total of $22,331.18, was paid by the estate on July 15, 1954, to the District Director of Internal Revenue, Gary Campbell.

Finding No. 11

On July 15, 1954, the plaintiff, as executor and trustee under the will of this decedent, filed a claim for refund of $22,753.09, the claim being based on the following contentions:

(1) The allowed deduction of $2,022.80 in expenses and attorney's fees for guardians ad litem for minor heirs actually should reduce by $364.34 the estate tax originally reported and paid, even allowing for all other adjustments except that stated in (3) below.

(2) That deduction be allowed "of an attorney fee of $4,000 more or less as may be allowed by the Probate Court and subsequently submitted to the Commission for the prosecution of this claim for refund"; and

(3) That the Commissioner erred in reducting the amount of the marital deduction, it being contended by the estate that the Commissioner erred in reducing the value of property passing to the decedent's widow by the sum of $83,992.04, consisting of Indiana State Inheritance Tax of $10,222.03 and Federal estate taxes of $58,770.01.

Finding No. 12

The above claim for refund was rejected by the Commissioner on October 10, 1954, and the executor was so advised by letter of that date. This action which was timely filed presents for the determination of the District Court the same issues which were raised by the claim for refund.

Finding No. 13

In determining the additional assessments, certain adjustments were made by the Commissioner of Internal Revenue as follows:

(1) After the payment of estate taxes on November 16, 1951, the Marion County Probate Court approved the payment of Fifteen Hundred Dollars ($1500.00) to Royce, Travis, Backer & Riddell as attorneys' fees for representing the Guardian Ad Litem, William McClenon, a fee of Five Hundred Dollars ($500.00) to Donald M. Ream as

Guardian Ad Litem for Paul Ferguson, and said payments were made together with Twenty-two Dollars and Eighty Cents ($22.80) for costs of a transcript of the evidence in said Cause No. 4261, which reduced the net estate by a total of Two Thousand Twenty-two Dollars and Eighty Cents ($2,022.80), which reduction was allowed in the computation of the deficiency assessment by the Internal Revenue Service.

(2) Certain adjustments tended to raise the value of the net estate over that stated in the November 16, 1951, return. These were:

The value of Fifteen(15) shares of Blue Ridge Corporation common stock was Fifty-seven Dollars and Nineteen Cents ($57.19) in lieu of Fifty-five Dollars and Sixty-nine Cents ($55.69);

Two(2) dividend checks from Standard Oil Company of New Jersey amount to Four Hundred Thirty-five Dollars ($435.00) rather than Four Hundred Two Dollars ($402.00);

A deduction of Two Hundred Twenty-four Dollars and Eighty-three Cents ($224.83) for premiums for fire insurance on dwellings and farm buildings was not allowed.

Plaintiff does not object to the adjustments stated in this Finding No. 13.

Finding No. 14

Plaintiff is entitled to additional attorneys' fees and costs of prosecution of this claim for refund in this District Court. A reasonable amount for said fees is Four Thousand Dollars ($4,000.00). Said fees and costs are deductible from said estate and will reduce the same and the estate tax thereon in the amount in which said fees and costs are hereafter allowed by the Probate Court of Marion County, Indiana, and paid from said estate.

Finding No. 15

The greater part of the additional assessment resulted from the computation of the marital deduction determined to be allowable under the applicable statute by the Commissioner of Internal Revenue, which was in words and figures as follows:

Value of property to widow		$344,925.59
Less:		
Federal estate tax (One-third of $161,310.02)	$53,770.01	
Inheritance taxes	10,222.03	
Total		63,292.04
Marital deduction allowable		$280,933.55

Finding No. 16

The Indiana state inheritance tax return and the federal estate tax return filed November 16, 1951, were in accordance with the judgment and instructions of the Marion County Probate Court in Civil Probate Cause No. 4261.

Finding No. 17

There was no evidence of any withholding of information from the Marion County Probate Court in connection with Civil Probate Cause No. 4261.

The above and foregoing Findings of Fact, No. 1 through No. 17, both inclusive, are now made, entered and signed this —— day of August, 1956.

CONCLUSIONS OF LAW

Conclusion of Law No. 1

The law is with the plaintiff and against the defendants, United States of America and Gary Campbell, District Director of Internal Revenue at Indianapolis, Indiana, and the plaintiff is entitled to recover $364.34 with interest from November 16, 1951 because of overpayment of the

federal estate tax originally reported in the estate of Guy E. Street, deceased, in view of the adjustments set forth in Finding 13 above, together with interest at 6% from November 16, 1951 until payment of said refund; plus a refund of the entire additional assessment of federal estate tax to the defendants in the amount of $22,331.19 on July 15, 1954, together with interest at 6% on said $22,331.18 from July 15, 1954 until paid; plus a reduction in federal estate taxes on said estate which shall arise from the payment as an expense of the estate of an attorney's fee to Arthur H. Northrup for the prosecution of this claim for refund in the amount paid, but not to exceed $4,000.00 for this prosecution of this case to this Federal District Court with interest on the amount of the overpayment resulting from said reduction from the dates of payments until payment of this judgment.

Conclusion of Law No. 2

The apportionment of federal estate tax and state inheritance tax in this case is controlled by the decision of the Marion County Probate Court in construing the will of Guy E. Street, deceased, in Civil Probate Cause No. 4261.

Conclusion of Law No. 3

The Marion County Probate Court had jurisdiction to construe the will of the decedent, Guy E. Street, and the terms of said will, as so construed by the Court control the apportionment of the burden of federal estate taxes and state inheritance taxes among the devisees, legatees, the surviving spouse, surviving joint tenants and tenants by the entireties, donees and beneficiaries of life insurance and place the burden of paying said taxes entirely on the residuary legatees.

Conclusion of Law No. 4

The federal estate tax return as filed on November 16, 1951 reduced in amount by the adjustments recited in Finding of Fact No. 13 above and the first Indiana inheritance tax return filed herein were in accordance with the order of the Marion County Probate Court in said Civil Probate Cause No. 4261.

Conclusion of Law No. 5

The construction of an Indiana will becomes a rule of property law, binding upon the determination of federal estate taxes whether or not the defendants, the United States of America and the District Director of Internal Revenue, or any other officer of the Internal Revenue Service were parties to the suit to construe the will.

Conclusion of Law No. 6

The apportionment of the burden of federal estate and state inheritance taxes is governed by state law.

Conclusion of Law No. 7

The state law is finally determined by a court of competent jurisdiction, in the absence of an appeal, and such determination is binding upon the defendants whether or not they are parties when, as here, there is no fraud on the state court or collusion among the parties in obtaining the judgment.

Conclusion of Law No. 8

The decision of the Marion County Probate Court in construing the will of Guy E. Street, deceased, and issuing instructions in Civil Probate Cause No. 4261 does not fail to give application to Indiana law and is not inconsistent

with any decisions of the Indiana Supreme Court or Indiana Appellate Court.

Conclusion of Law No. 9

Marital deduction property, being tax free, is not equitably subject to any apportioned burden of the federal estate tax.

Conclusion of Law No. 10

Under the decision of the Marion County Probate Court in Cause No. 4261, the excutor is bound to distribute to the widow her property which qualifies for the marital deduction as provided by the federal estate tax laws, particularly Section 812E of the Internal Revenue Code of 1939, as amended, free of any burden or apportionment of federal estate taxes or estate inheritance taxes.

Conclusion of Law No. 11

The decedent's will controls the payment of taxes and as construed by said Marion County Probate Court, directs the executor to pay the federal estate and state inheritance taxes out of the property passing under the residuary item of the will and specifically prevents apportionment of taxes against testator's widow and others.

Conclusion of Law No. 12

To compute the federal estate tax as though the marital deduction property were reduced by an apportioned share of federal estate taxes and Indiana inheritance taxes, when such reduction of the widow's marital deduction property will not in fact take place and cannot take place under the judgment of the Marion County Probate Court, would violate the due process clause of the Fifth Amendment of the Constitution of the United States.

It is so ordered, and counsel for plaintiff will submit appropriate judgment in accordance herewith.

CALE J. HOLDER,
(S) Cale J. Holder,
United States District Judge.

[Caption Omitted.]

JUDGMENT

(Filed Sept. 24, 1956)

On the same day, September 24, 1956 the District Court entered judgment for petitioner which, without its formal parts, reads as follows:

This action came on to be tried before the court, and the evidence adduced by the parties having been heard, and the court having made its findings of fact and conclusions of law, it is hereby

Adjudged, that the plaintiff, Merchants National Bank & Trust Company of Indianapolis, recover of defendants, United States of America and Gary Campbell, District Director of Internal Revenue at Indianapolis, Indiana, the sum of $364.34 together with interest at 6% from November 16, 1951 until payment of said refund; plus the sum of the entire additional assessment of federal estate tax to the defendants in the amount of $22,331.18 on July 15, 1954, together with interest at 6% on said $22,331.18 from July 15, 1954 until paid; plus the amount of a reduction in federal estate taxes on said estate which shall arise from the payment as an expense of the estate of an attorney's fee to Arthur H. Northrup and court costs in the amount paid, but not to exceed $4,000.00 for the attorney's fee for prosecution of this case to this United States District Court with interest on the amount of the overpayment of federal

estate taxes from November 16, 1951 until payment of this judgment, and that the plaintiff have its costs as taxed and have execution therefor.

(S) Cale J. Holder,
CALE J. HOLDER,
United States District Judge.

The Fifth Amendment, United States Constitution, provides that: *No person shall be* held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

(The due process clause has been italicized.)

Internal Revenue Code of 1939, Section (e) (1) (A) and (E) (i) provides:

Sec. 812. NET ESTATE

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deduction from the value of the gross estate.

(e) (as added by Sec. 361, Revenue Act of 1948, c. 168, 62 Stat. 110) Bequests, Etc., to Surviving Spouse.

(1) Allowance of marital deduction.

(A) In General. An amount equal to the value of any interest in property which passes or has passed

from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(E) Valuation of Interest Passing To Surviving Spouse. In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection.

(i) there shall be taken into account *the effect which a tax imposed by this chapter, or any estate,* succession, legacy, *or inheritance tax, has upon the net value to the surviving spouse of such interest;* . . .

Indiana Revised Statutes 1852, Chapter 27, No. 17, Page 248 (Burns' 1933 ed., 6-2313), provides that: If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors: Provided, however, That where the real estate exceeds in value ten thousand dollars ($10,000.00), the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars ($20,000.00), one-fifth only, as against creditors.

Indiana Revised Statutes 1881 (Special Session), Chapter 45, No. 222, Page 423 (Burns' 1933 ed., 6-1907), provides that: If, by the will of the deceased, any part of his estate, or any one or more of the devisees or legatees, shall be made exclusively liable for the debt, in exoneration of the estate or of the devisees or legatees, the provisions of the will shall be complied with in that respect; and the real estate, and the persons so exempted by the will, shall be liable only for so much of the debt as cannot be recovered from those first chargeable therewith.

Indiana Revised Statutes 1881 (Special Session), Chapter 38, No. 112, Page 240 (Burns' 1933 ed., 20-1030), provides: When the pleadings show sufficient excuse for not

admitting or denying an allegation, such excuse operates as a denial of the truth of the allegation and to require its proof.

Indiana Revised Statutes 1881 (Special Session), Chapter 38, No. 101, Page 240 (Burns' 1933 ed., 2-1023), provides: It shall be the duty of the guardian of an infant, or committee of a person of unsound mind, or attorney appointed for a prisoner, to file an answer, denying the material allegations of the complaint prejudicial to such defendant, without oath.

Indiana Revised Statutes 1891, Chapter 185, No. 1, Page 404 (Burns' 1933 ed., 6-2319), provides: If a man die testate leaving a widow, one third of his personal estate shall descend to said widow, subject, however, to its proportion of the debts of said decedent: *Provided, however, That nothing in this act shall be construed to reduce the interest which the law now gives a widow in the estate of a deceased husband:* And provided, further, That such widow may elect to take under the will of said decedent instead of this or any other law of descent of this state, which election shall be made within ninety (90) days after said will has been admitted to probate in this state, and in the same manner as widows are now required by law to elect. (Emphasis added. The paragraph following repeals the last proviso and modifies the above act.)

Indiana Revised Statutes 1907, Chapter 48, No. 3, Page 73 (Burns' 1933 ed., 6-2334), provides: Any surviving husband or wife desiring to renounce the provisions made for him or her in any such will shall file his or her election in writing, duly signed and acknowledged before some officer authorized to take acknowledgments of deeds, and such election shall be made and filed within one (1) year after such will has been admitted to probate in this state. Said election shall be filed and recorded in the office of the

clerk of the circuit court in which such will is probated, and the same shall be recorded by such clerk in the record of wills, reference being made from such record to the book and page in which such will is recorded, and from the record of such will to the book and page where such election is recorded. In such election, such husband or wife shall state that he or *she renounces the provisions made for* him or *her in such will* and that he or she elects to take the interest in such estate that is given to him or her under the laws of descent of the state of Indiana. After making such election, such husband or wife shall receive none of the provisions made for him or her in such will. (Emphasis added.)

Indiana Revised Statutes 1917, Chapter 141, No. 1, Page 520 (Burns', 1933 ed., 4-2910), provides in part as follows: Said probate court, within and for the county for which it is organized, shall have original, exclusive jurisdiction in all matters pertaining to the probate of wills, . . . and settlement of estates of deceased persons and of trusts . . . and all other probate matters, and shall have concurrent jurisdiction in the following matters: . . . Fifth. Complaints to construe wills and to dissolve trusts. Sixth. All actions by and against executors, administrators, guardians, assignees and trustees.

Indiana Revised Statutes 1931, Chapter 75, No. 10, Page 192 (Burns' 1933 ed., 6-2410), provides: The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the court and the other in the office of the state board of tax commissioners. Upon filing such report in the court, the court shall forthwith give twenty (20) days' notice by mail to all persons known to be interested in the estate, including the state board of tax commissioners, of the time and place for the hearing in the matter of such report, and the court, from such

report, shall forthwith, at the time so fixed, determine the cash value of such estate and the amount of tax to which the same is liable. . . .

Rules of Civil Procedure, Rule 52 (a) provides: (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are necessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948.

Treasury Regulations 105, Section 81.47c provide:

Sec. 81.47c (as added by T.D. 5699, 1949-1 Cum. Bull. 181.) Valuation of Property Interest Passing to Surviving Spouse.

(c) Effect of death taxes. Section 812 (e) (1) (E) provides that in the determination of the value of any property interest which passed from the decedent to his surviving spouse, *there shall be taken into account the effect which the Federal estate tax, or any estate, succession, legacy, or inheritance tax, has upon*

the net value to the surviving spouse of such property interests.

If the decedent bequeaths his residuary estate, or a portion thereof to his surviving spouse, and his will contains a direction that all death taxes shall be payable out of such residuary estate, the value of the bequest, for the purpose of the marital deduction, is based upon *the amount of the residue as reduced pursuant to such direction.* (Emphasis added.)

If the residuary estate, or a portion thereof, is bequeathed to the surviving spouse, and by the local law the Federal estate tax is payable out of the residuary estate, the value of the bequest, for the purpose of the marital deduction, may not exceed the amount thereof as reduced by the Federal estate tax.

The Supreme Court of Indiana, Rule 1-3, 2 Burns' (1946 Repl.) Part 1, provides: A statement that the pleader is without information as to the facts contained in an allegation shall have the effect of a denial thereof. All defenses shall be provable under a specific denial or statement of no information, which were heretofore available under an answer or reply in general denial.

Note On The Minority Rule

Of the sixteen states which have decisions of courts of appellate jurisdiction on the question of apportionment of federal estate taxes against marital deduction property, a minority of six, including Illinois and Wisconsin in the Seventh Circuit, favor the Government. In its opinion herein, the Seventh Circuit cited *In Re Donovan's Estate,* 409 Ill. 195, 98 N. E. 2d 759, in which a husband who renounced his wife's will nevertheless thereafter continued as her executor and could draw compensation as such. This shows that, even under the minority rule, *specific administrative directions in a will are not affected by the surviving*

spouse's renunciation even when the directions incidentally are financially beneficial to the spouse along with others.

In Re Uihlein's Will, 264 Wis. 362, 59 N. W. 2d 641, was also relied upon in the Seventh Circuit's opinion herein. In *Uihlein*, the Wisconsin Supreme Court, citing *Wachovia Bank & Trust Co.* v. *Green*, 236 N. C. 654, 73 S. E. 2d 879,[1] felt that it had no power to require equitable apportionment in the absence of statutory authority. Indiana has already adopted equitable apportionment without a statute in *Pearcy* v. *Citizens Bank & Trust Co.*, 121 Ind. App. 136, 96 N. E. 2d 918, rehearing denied, 121 Ind. App. 136, 98 N. E. 2d 231. Second, the *Uihlein* decision was based on the public policy of Wisconsin (and Illinois) to confine a widow who renounces her husband's will to the rights in his estate given her by the renunciation statute. Burns' 6-2334 expressly states Indiana law to the contrary. Thus, the reasoning of the minority rule decisions conflicts directly with established Indiana law.[2]

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[1] To the same effect are: *Northern Trust Co.* v. *Wilson*, 344 Ill. App. 508, 101 N. E. 2d 604; *Campbell* v. *Lloyd*, 162 Ohio St. 203, 122 N. E. 2d 695; *Moorman* v. *Moorman*, 340 Mich. 636, 66 N. W. 2d 248; *Weinberg* v. *Safe Deposit & Trust Co.*, 198 Md. 539, 85 A. 2d 50.

[2] Renunciation of the will by a widow does not affect the binding force of the will on others, including the executor. *Garrison* v. *Day* (1905), 26 Ind. App. 548, 76 N. E. 188; *Cassidy* v. *Padgett* (1934), 99 Ind. App. 234, 190 N. E. 133; Indiana Acts 1907, Ch. 48, #3, p. 78; Burns (1933) 6-2334.

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IN THE

Supreme Court of the United States

October Term, 1957

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS, SUCCESSOR BY CONSOLIDATION TO THE INDIANA TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF GUY E. STREET, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA AND GARY CAMPBELL, DISTRICT DIRECTOR OF INTERNAL REVENUE,

Respondent.

REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

(a) Opinions Below

The statements of the taxpayer and the Government agree, except that the taxpayer's Petition gives the Court the benefit of the unofficial reports which selected for publication both the District Court's Findings and Conclusions

and the Seventh Circuit's reversal, because of the importance of the federal estate tax questions involved.

(b) Jurisdiction

The parties agree that 28 U.S.C. 1254 (1) gives this Court jurisdiction, but the taxpayer also shows that Rule 19, 1(b) specifies the grounds for certiorari.

(c) Questions Presented

The Government fails to argue the following questions:

(1) the binding force of the testamentary direction to taxpayer to pay taxes from the residue;

(2) the binding effect of a state court's construction of the terms of a will or other judgment governing estate tax allocation;

(3) what constitutes consent or collusion in the proceedings of a state court which will vitiate its authority in federal matters?

(4) the requirement of the Internal Revenue Code, Section 812 (e) (1) that the marital deduction amount be reduced by death taxes only if a part of such taxes is in fact apportioned against the marital deduction property; and

(5) the violation of the Fifth Amendment's due process clause which results from taxing an estate as though the residuary trust received property which was actually distributed to the widow free of the residuary trust.

These are all questions of federal law.

This case decides questions (2), (3) and (4), contrary to the Third Circuit Court of Appeals' decision in *Babcock's Estate v. Commissioner*, 234 F. (2d) 837. It decides

the questions contrary to the Tenth Circuit on question (1) in *Thompson v. Wiseman*, 233 F. (2d) 734 and on questions (2) and (3) in *Brodrick v. Gore*, 224 F. (2d) 892 and *Brodrick v. Moore*, 226 F. (2d) 105. On questions (2) and (3), this decision conflicts with the Fourth Circuit in *Pitts v. Hamrick*, 228 F. (2d) 486; on (3), with the Sixth Circuit in *Goodwin's Estate v. Commissioner*, 201 F. (2d) 576. *The decision herein conflicts with the principles of law established by the following decisions of the United States Supreme Court.* On (1), *Harrison v. Northern Trust Company*, 317 U. S. 476; *Blair v. Commissioner*, 300 U. S. 5. On (2) and (3), *Blair v. Commissioner*, 300 U. S. 5, and *Freuler v. Helvering*, 291 U. S. 35, 41, 44-5. Relevant to (4), *Harrison v. Northern Trust Company*, 317 U. S. 476 and the dissent in *Freuler v. Helvering*, 291 U. S. 35. On (5), the authorities under (4), *Heiner v. Donan*, 285 U. S. 312, and *Hoeper v. Tax Commission*, 284 U. S. 206, coupled with *Bolling v. Sharpe*, 347 U. S. 497.

The Government's brief likewise ignores the following questions of federal procedure inherent in the Seventh Circuit's decision herein:

(1) Can the Court of Appeals avoid the legal question of whether actual consent or collusion is necessary to vitiate the federal effect of a state court decree by falsely stating that the taxpayer agreed that proof of consent or collusion is unnecessary?

See Petition for Certiorari, pages 14 and 20.

(2) When the Court of Appeals decides in favor of the appellee on the only specific issue of fact raised by the appellant, can it reverse the District Court's judgment on the resulting general question of fact?

See Petition, pages 14-15 and 21.

(3) When the parties stipulate that a certain judgment is the final judgment of the state court, can the Court of Appeals treat some other decree of the state court as the final judgment, contrary to the stipulation and to the law of the state?

See Petition, pages 15 and 21.

(4) Can a Circuit Court consider one party's independent decision not to allow his attorney to appeal from state court's judgment as evidence proving consent to the judgment or any later identical judgment, when there is undisputed evidence to the contrary?

See Petition, page 15.

(5) When there are no decisions of higher state courts on the exact point of the widow's right to take marital deduction property free of taxes by electing to take against a will which directs the executor to pay death taxes out of the residue, can a Court of Appeals ignore the authority of the law of the case and of specific state statutes[1] by relying on dicta in two decisions under an election statute which was repealed in 1907[2] and upon a third case which enforced a specific agreement of the parties for the advancement of funds to pay estate taxes when the personal property was insufficient.[3]

See Petition, page 18.

These ten questions are matters of great importance to federal estate taxation, to federal-state judicial relationships, to federal appellate procedure and to individual constitutional rights. The marital deduction questions have not been passed upon by this Court. On these questions,

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[1] Burns' (1933) 6-2334 and especially Burns' 6-1907.

[2] *Clark v. Clark* (1902), 122 Ind. 25, 21 N. E. 461 and *Rowley v. Sowns* (1896), 141 Ind. 179, 40 N. E. 674; repealed by Burns' (1933), 6-2334.

[3] Cornet v. Gusdelhoefer (1941), 219 Ind. 200, 36 N. E. 2d 933.

this decision conflicts with decisions of the Third and Fourth Circuits and with the reasoning of the Tenth Circuit.

(d) Statutes and Regulations

Burns' 6-1301 is irrelevant. Since the residue was ample to pay all debts, costs of administration and taxes, the statute on priorities has no application to this estate.

The Government's citation of Burns' 6-301 is irrelevant and deceitful, because any life estate which might accelerate upon the widow's renouncing the will would fail to qualify for marital deduction in any event, since it would be a terminable interest. Moreover, the statute was enacted in 1953 and had no application to this estate, for the decedent died in 1950. His estate was governed by the rule of *Rocker v. Metzger* (1908), 171 Ind. 364 and *Cassidy v. Padgett* (1934), 99 Ind. App. 89, the principles of which survive this later statutory modification as to life estates.

STATEMENT OF THE CASE

The statement on pages 4-5 of the Government's brief: "The only answer in opposition to the complaint was filed on behalf of William McClenon as guardian *ad litem* of the minor and unborn children of himself and decedent's daughter, Ruth Gladys McClenon" is false. See Petition for certiorari, pages 54-55, 7, 8.

Copying the late Adolph Hitler, who appeared to believe that if a lie were repeated often enough it would be accepted as true, the Government says on page 6 of its brief, ". . . his (Mr. Travis') testimony was to the effect that his clients informed him that they were in accord with the order of the Probate Court, that they were in agreement with the contentions advanced by the executor and widow . . .".

This statement is not supported by a scintilla of evidence. It is also contrary to Mr. Travis' testimony on the subject. Pages 63-4 of the appendix to the Government's Court of Appeals brief are the only references given on page 8 which are on this subject. They are contrary to the statement, as are pages 60, 61, 62, and 63 of said appendix. The lie quoted above has been repeated in every brief the Government has written herein since the trial. The writer of the Seventh Circuit's opinion copied it verbatim. Under the Seventh Circuit's peculiar view that the later of two identical state court judgments was involved, this lie was decisive in the case. Such judicial irresponsibility cries out for certiorari.

ARGUMENT

Most of the argument of the Government is aimed at making this case appear to be limited to abstruse questions of Indiana probate law. It has been answered by pointing out the important issues of federal law and the conflict of Circuits. The Commissioner's intermeddling in questions of the probate law of the state as fairly determined by the state courts is precisely the evil that was intended to be avoided by the Federal estate tax as enacted by Congress. See the decisions of this Court in *Riggs v. Del Drago*, 317 U. S. 95, p. 4, 5; *Blair v. Commissioner*, 300 U. S. 5 and *Freuler v. Helvering*, 291 U. S. 35.

Contrary to the Government's statement on page nine, all but four of the taxpayer's twelve Indiana Supreme or Appellate Court decisions on probate matters involved elections against a will. See Petition for certiorari, page 17 and note 3. *So does Babcock's Estate v. Commissioner* (C. A. 3, 1956), 234 F. 2d 837. The *Babcock* case reversed a Tax Court decision which had been similar to the Seventh Circuit's decision here. Except for the taxpayer's case of *Cassidy v. Padgett*, 99 Ind. App. 234, 190 N. E. 133, not one of the Government's Indiana citations discusses the spouse's rights after an effective election against a will.

The point of probate law which is of general interest in federal taxation is that a widow renounces only the testamentary provisions *for her*, without affecting the directions to the executor to pay taxes from the residue. *Commerce Union Bank v. Albert* (Tenn., 1957), 301 S. W. 2d 352; Burns' (1933) 6-2334 and 6-1907. So the situation remains controlled by the will; it is not like total intestacy. Even if it were, *Pearcy v. Citizens Bank & Trust Co.* (1951), 121

Ind. App. 136, 96 N. E. 2d 918, 98 N. E. 2d 231 expressly adopts as Indiana law the Kentucky rule of equitable apportionment. Hence *Lincoln Bank and Trust Co. v. Huber* (Ky., 1951), 240 S. W. 2d 89 would be decisive authority for the taxpayer.

CONCLUSION

For the reasons set forth herein and in the Petition, this case presents federal questions which have never been passed on by this Court, or which have been decided contrary to the Seventh Circuit's erroneous reversal of both the state and the federal trial courts herein. It is respectfully submitted that the petition for a Writ of Certiorari should be granted.

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Office · Supreme Court, U.S.
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No. 479

In the Supreme Court of the United States

OCTOBER TERM, 1957

MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS, SUCCESSOR BY CONSOLIDATION TO THE INDIANA TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF GUY E. STREET, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA AND GARY CAMPBELL, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The special findings of fact and separate conclusions of law of the District Court (Pet. 40–71; R. 64–95)[1]

[1] References designated "R." are to the appendix to the brief filed in the United States Court of Appeals for the Seventh Circuit on behalf of the Defendants-Appellants, the United States of America and District Director of Internal Revenue. References designated "Supp. R." are to the appendix to the brief filed in that court on behalf of the taxpayer, Merchants National Bank & Trust Company of Indianapolis.

are not officially reported. The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. 25–39) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 20, 1957. (Pet. 39.) A petition for rehearing was denied August 6, 1957. (Pet. 39.) The petition for a writ of certiorari was filed September 18, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

In computing the marital deduction allowed for federal estate tax purposes by Section 812 (e) of the Internal Revenue Code of 1939, is the value of the widow's interest in the estate of an Indiana decedent, which she elected to take against the will, to be reduced by the portion of the federal estate and state inheritance taxes attributable to her interest?

STATUTES AND REGULATIONS

The relevant portions of Section 812 (e) (1) (A), (e) (1) (E) (i), (e) (3) (A), (e) (3) (B), and (e) (4) (A) of the Internal Revenue Code of 1939, Section 81.47c of Treasury Regulations 105, Sections 6–1301, 6–2313, and 6–2319 of Burns Indiana Statutes Annotated (1933 ed.), and Section 6–301 of Burns Indiana Statutes Annotated (1953 ed.), are set out in the Appendix, *infra*, pp. 12–15.

STATEMENT

The facts as stipulated by the parties (R. 37–54), as set forth in the findings of fact of the District

Court (Pet. 40–67), and as otherwise shown in the record, may be summarized as follows:

Guy E. Street died August 16, 1950, his will being duly probated in the Probate Court of Marion County, Indiana. The taxpayer herein is the duly appointed executor and trustee under the will. The text of the will appears in full in the special findings of fact. (Pet. 41–51; R. 65–76.) By his will, deceased left certain personal property to his wife, other personal property to his daughter, and made specific bequests to four relatives. The rest of his estate by Item V of the will was placed in trust, 2% of the principal to be distributed during a ten-year period to his wife, daughter, and other beneficiaries in named percentages; the income of the trust to be distributed to various beneficiaries, including 4/10 to his wife for life, at her death to their daughter, and at her death to grandchildren; the trust to continue for the lives of the various beneficiaries, and the principal of the trust to be then distributed as provided in the will. (Pet. 26; R. 38, 65–76.)

The will provided in part (Pet. 41, 48; R. 65, 72):

Item I

> I direct that all federal estate and state inheritance and estate taxes that may be assessed upon my estate or payable by any beneficiary thereof on account of the provisions hereof made in their behalf be paid from and out of my residuary estate.

Item V

* * * * *

10. My Trustee is specifically authorized and empowered: * * * to apply the principal of the trust estate to the payment of any and all inheritance, estate, succession or other taxes, State or Federal, levied or assessed against my estate or any beneficiary thereof by reason of the transfers herein; * * *.

On February 14, 1951, the widow renounced the provisions made for her in the will and elected to take under the laws of descent of Indiana, reserving, however, her interest in life insurance policies of which she was beneficiary, and her rights as surviving tenant by the entireties in certain real estate. (Pet. 52–53; R. 39, 76–78.)

Her renunciation stated in part (Pet. 53; R. 77):

> It is not intended hereby and I do not release the Executor under the last will and testament of the said decedent and his estate from existing obligations to make payment of all federal estate taxes imposed upon any and all property hereinabove referred to, and all state inheritance and estate taxes.

On May 7, 1951, the taxpayer filed a complaint in the Marion County Probate Court for a construction of the will and for instructions, joining the widow, heirs, legatees, and beneficiaries of the trust as defendants. The complete record of this proceeding is attached to the stipulation of facts (R. 37–54) in the original transcript of record as Exhibit D, and excerpts appear in the record. (R. 44–51; Supp. R. 1–15.) The only answer in opposition to the com-

plaint was filed on behalf of William McClenon as guardian *ad litem* of the minor and unborn children of himself and decedent's daughter, Ruth Gladys McClenon. In this answer, McClenon's attorney, Howard P. Travis, alleged that the widow by her election had lost all her rights to any property under the will, and that she should be required to pay her additional share of federal estate tax in proportion to the property received by her. The Probate Court held an oral hearing October 23, 1951, and ordered briefs filed. After briefs were filed on behalf of the executor and the widow, but before Mr. Travis had an opportunity to file a brief in answer to these briefs, the Probate Court on February 21, 1952, entered its order adjudicating the issues in favor of the widow. The Government was not a party to this proceeding. (Pet. 54–56; R. 44–49, 56–58, 78–87.)

The Probate Court ordered in part (R. 81, 84):

> ORDERED, ADJUDGED, AND DECREED that The Indiana Trust Company, as Executor, is hereby ordered to pay all federal estate taxes and all inheritance taxes assessed by the United States, the State of Indiana or any other state, by virtue of the death of Guy E. Street or any transfer made by Guy E. Street, deceased, and The Indiana Trust Company as Executor or as Trustee is hereby ordered not to seek or receive reimbursement for any portion of said inheritance or federal estate taxes, from any person whomsoever, whether he be beneficiary of a life insurance policy, surviving joint tenant, or tenant by the entirety, heir, donee, surviving widow, assignee, legatee, devisee, cestui que trust, or other person;

Mr. Travis on behalf of his clients filed a Motion for New Trial on March 11, 1952, alleging that the decision of the Probate Court was contrary to law, and that the proceedings were irregular in that decedent's daughter, a necessary party, was not represented at the trial and no judgment of default was entered against her, so that the decree was void as to all defendants. On March 18, 1952, Mr. Travis withdrew the motion for new trial, and also his appearance as counsel, at the express direction of the defendants he represented. The Probate Court subsequently entered a second judgment identical with the first except for an additional finding and judgment of default against decedent's daughter. Mr. Travis testified as a witness for the Government at the trial of the instant proceeding, and his testimony was to the effect that his clients informed him that they were in accord with the order of the Probate Court, that they were in agreement with the contentions advanced by the executor and widow, and that it was not desired that he proceed further with his motion for new trial. (R. 49–51, 59, 63–64, 81–95.)

In the estate tax return filed by the executor on November 16, 1951, a deduction under Schedule M for bequests, etc., to surviving spouse (marital deduction) was claimed in the amount of $344,846.58, as representing the value of property passing to the widow. After an audit of the return, the Commissioner determined that the amount of the marital deduction should be $280,933.55, computed by deducting from the amount claimed the amount of federal estate tax ($53,770.01) and state inheritance tax

($10,222.03) applicable to the widow's interest in the estate. The net assessed deficiency, resulting from this and other adjustments not here in issue, of $19,266.51 plus interest of $3,064.67, or a total of $22,331.18, was paid to the District Director. The executor's claim for refund was rejected by the Commissioner, and this suit for refund followed. The District Court decided the case in favor of the taxpayer. (R. 39–43, 51–53, 95–96; Pet. 71–72.) The Court of Appeals sustained the Commissioner's determination. It held that, in computing the marital deduction allowable under 1939 Code Section 812 (e) (1) (E) (i), Indiana law requires that the value of the interest passing to the widow be reduced by the *pro rata* share of the federal estate tax attributable to her interest; and it found under the facts that the decree of the Probate Court of Marion County was non-adversary, contrary to Indiana law, and not binding on the United States. (Pet. 25–39.)

ARGUMENT

There is no basis for further review. The decision below turns upon the application of state law to the particular facts of this case, is correct, and is not in conflict with any appellate court decision.

1. For purposes of computing the net estate subject to the federal estate tax, Section 812 (e) of the Internal Revenue Code of 1939, Appendix, *infra*, pp. 12–13, authorizes a deduction from the gross estate of a so-called marital deduction, *i. e.*, "the value of any interest in property which passes or has passed from the decedent to his surviving spouse". This section

further provides that the interest passing to the surviving spouse must be valued after taking into account "the effect" upon it of the federal estate tax. What property interests pass from the decedent to his heirs or legatees, and the impact upon such interest of the federal estate tax, are matters of state law. *Riggs* v. *Del Drago*, 317 U. S. 95; *Harrison* v. *Northern Trust Co.*, 317 U. S. 476; *Y. M. C. A.* v. *Davis*, 264 U. S. 47.

In this case, an Indiana decedent left a will directing that all federal estate and state inheritance taxes be paid out of his residuary estate, which was bequeathed in trust for the benefit of various members of his family including his wife. The widow renounced the will and elected to take the share to which she was entitled under the Indiana laws of descent, namely, a one-third interest in the decedent's property after payment of debts. After analyzing the applicable Indiana law, the court below concluded that the widow's elective share was subject to a proportionate share of the estate taxes, and that consequently the value of her interest for purposes of computing the marital deduction must be correspondingly reduced. (Pet. 28–33.) Its decision is clearly in accord with the Indiana statutory scheme of distribution, and with Indiana decisions holding that where a wife renounces the will she receives her interest after payment of debts, including taxes. See Burns Indiana Statutes Annotated (1933 ed.), Sections 6–1301, 6–2313, 6–2319, 6–2334; *Cornet* v. *Guedelhoefer*, 219 Ind. 200; *Quirk* v. *Kirk*, 64 Ind. App. 496; *Pearcy* v. *Citizens Bank & Trust Co. of Bloomington*, 121 Ind. App. 136, rehear-

ing denied, 121 Ind. App. 136, *Cassidy* v. *Padgett*, 99 Ind. App. 239.

The county probate court decree upon which taxpayer relies (Pet. 19–20) is contrary to the Indiana statute and higher court decisions. Moreover, that decree was obtained in a non-adversary proceeding—a conclusion demanded by the facts recited in the opinion below (Pet 33–38)—and hence was not binding upon the United States in this federal tax litigation. See *Commissioner* v. *Tower*, 327 U. S. 280; *Newman* v. *Commissioner*, 222 F. 2d 131 (C. A. 9th); *Falk* v. *Commissioner*, 189 F. 2d 806 (C. A. 3d), certiorari denied, 342 U. S. 861; *Doll* v. *Commissioner*, 149 F. 2d 239 (C. A. 8th), certiorari denied, 326 U. S. 725; *Pitts* v. *Hamrick*, 228 F. 2d 486 (C. A. 4th).

2. Taxpayer points to no authority which is in conflict with the decision below. The cases upon which it relies did not involve the application of Indiana law to a situation where, as here, the widow renounces the will. Indeed, seven of the eight state court decisions with which it alleges conflict (Pet. 18, fn. 2) arose in jurisdictions which, unlike Indiana, have statutes governing apportionment of estate taxes,[2] and the law of the other (Kentucky) is different from that of Indiana. See *Pearcy* v. *Citizens Bank & Trust Co. of Bloomington*, *supra*, pp. 156–157. As for the

[2] The states differ as to the effect of the estate tax in the absence of a specific provision in the will. Some have apportionment statutes expressly dealing with the problem. Of those which do not have such statutes, the courts of some have held that the share inherited by the widow is free of the tax, while those of others (*e. g.*, Indiana) have held that her share must bear a proportionate share of the tax.

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Indiana cases upon which taxpayer relies (Pet. 16), none of them dealt with whether a widow's elective share of her husband's estate is subject to a *pro rata* share of the estate tax. Taxpayer's attempt (Pet. 16–17) to assimilate this case to one where the will directs payment of the widow's share free of the tax burden is unfounded; under Indiana law the widow cannot renounce the will and yet retain its benefits. *Rowley* v. *Sanns*, 141 Ind. 179; *Clark* v. *Clark*, 132 Ind. 25. By renouncing the will and electing to take under the Indiana laws of descent, the widow received one-third of the decedent's estate after payment of debts (Burns Indiana Statutes Annotated (1933 ed.), Sections 6–2313 and 6–2319, Appendix, *infra*, pp. 14–15; *Quirk* v. *Kirk*, *supra*); and the Indiana law prescribes payment of taxes ahead of payment to legatees or heirs (Burns Indiana Statutes Annotated (1933 ed.), Section 6–1301, Appendix, *infra*, p. 14; *Cornet* v. *Guedelhoefer*, *supra*).

Nor is there any conflict, as taxpayer asserts (Pet. 16, 19–20), with cases dealing with the effect of state court decisions in federal tax cases. The record clearly shows, as the court below concluded, that the county probate court decree which taxpayer insists should have been accorded binding effect for federal estate tax purposes was procured in a non-adversary proceeding. Such a decree is not determinative of federal tax consequences. See *Newman* v. *Commissioner*, 222 F. 2d 131 (C. A. 9th); *Doll* v. *Commissioner*, 149 F. 2d 239 (C. A. 8th), certiorari denied, 326 U. S. 725. The cases cited by taxpayer did not, as

does this one, involve a non-adversary or collusive proceeding.[3]

3. The issue presented is not one of general importance. Since it turns entirely on Indiana law and its own facts, the decision below can affect only a limited class of decedents. It will not be controlling as to decedents in other states. Even as respects Indiana decedents, it will not affect one who leaves a will which makes specific provision regarding apportionment of the estate tax; it applies only where the decedent dies intestate, or leaves a will which the surviving spouse renounces.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
HARRY BAUM,
CAROLYN R. JUST,
Attorneys.

OCTOBER 1957.

[3] In any event, as the court below observed (Pet. 36), there is no need in this case to resolve any alleged conflict on this point, since both parties agreed below that the probate court decree is not binding in this federal tax litigation if it was entered in a non-adversary proceeding.

APPENDIX

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(e) [as added by Sec. 361, Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of marital deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

* * * * *

(E) *Valuation of Interest Passing to Surviving Spouse.*—In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection—

(i) there shall be taken into account the effect which a tax imposed by this chapter, or any estate, succession, legacy, or inheritance tax, has upon the net value to the surviving spouse of such interest; and

* * * * *

(3) *Definition.*—For the purposes of this subsection an interest in property shall be considered as passing from the decedent to any person if and only if—

(A) such interest is bequeathed or devised to such person by the decedent; or

(B) such interest is inherited by such person from the decedent; or

* * * * *

(4) *Disclaimers.*—

(A) *By Surviving Spouse.*—If under this subsection an interest would, in the absence of a disclaimer by the surviving spouse, be considered as passing from the decedent to such spouse, and if a disclaimer of such interest is made by such spouse, then such interest shall, for the purposes of this subsection, be considered as passing to the person or persons entitled to receive such interest as a result of the disclaimer.

* * * * *

(26 U. S. C. 1952 ed., Sec. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

SEC. 81.47c [as added by T. D. 5699, 1949–1 Cum. Bull. 181, 206]. *Valuation of Property Interest Passing to Surviving Spouse.*—

* * * * *

(c) *Effect of death taxes.*—Section 812 (e) (1) (E) provides that in the determination of the value of any property interest which passed from the decedent to his surviving spouse, there shall be taken into account the effect which the Federal estate tax, or any estate, succession, legacy, or inheritance tax, has upon the net value to the surviving spouse of such property interest.

* * * * *

If the decedent bequeaths his residuary estate, or a portion thereof, to his surviving spouse, and his will contains a direction that all death taxes shall be payable out of such residuary estate, the value of the bequest, for

the purpose of the marital deduction, is based upon the amount of the residue as reduced pursuant to such direction. If the residuary estate, or a portion thereof, is bequeathed to the surviving spouse, and by the local law the Federal estate tax is payable out of the residuary estate, the value of the bequest, for the purpose of the marital deduction, may not exceed the amount thereof as reduced by the Federal estate tax.

* * * * *

Burns Indiana Statutes Annotated (1933 ed.):

SEC. 6-1301 [3229]. *Order of paying debts.*—Unless otherwise provided in this act, the debts and liabilities of a decedent, shall, if his estate be solvent, be paid in the following order of classes:

First. The expense of administration.

Second. The expenses of the funeral of the deceased.

Third. The expenses of his last sickness.

Fourth. Taxes accrued upon the real and personal estate of the deceased at his death, and taxes assessed upon the personal estate during the course of the administration.

Fifth. Debts secured by liens upon the personal and real estate of the decedent, * * *

Sixth. A sum not exceeding fifty dollars [$50.00] for wages due any employee for work and labor performed for the decedent within two [2] months prior to his death.

Seventh. General debts.

Eighth. Legacies. [Acts 1881 (Spec. Sess.), ch. 45, § 152, p. 423.]

SEC. 6-2313 [3337]. *Widow.*—If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors: Provided, however, That where the real estate exceeds in value ten thousand dollars [$10,000], the widow shall have one-fourth only, and where

the real estate exceeds twenty thousand dollars [$20,000], one-fifth only, as against creditors. [I. R. S. 1852, ch. 27, § 17, p. 248.]

SEC. 6–2319 [3343]. *Widow's interest in personal estate.*—If a man die testate leaving a widow, one third of his personal estate shall descend to said widow, subject, however, to its proportion of the debts of said decedent: Provided, however, That nothing in this act shall be construed to reduce the interest which the law now gives a widow in the estate of a deceased husband: And provided, further, That such widow may elect to take under the will of said decedent instead of this or any other law of descent of this state, which election shall be made within ninety [90] days after said will has been admitted to probate in this state, and in the same manner as widows are now required by law to elect. [Acts 1891, ch. 185, § 1, p. 404.]

Burns, Indiana Statutes Annotated (1953 ed.):

SEC. 6–301 * * *

(d) * * * Where by virtue of an election pursuant to this article [§§ 6–301—6–308] it is determined that such spouse has renounced his rights in any devise, either in trust or otherwise, the will shall be construed with respect to the property so devised to him as if such surviving spouse had predeceased the testator.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 479

MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS, SUCCESSOR BY CONSOLIDATION TO THE INDIANA TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF GUY E. STREET, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA AND GARY CAMPBELL, DISTRICT DIRECTOR OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

Petitioner presents its petition for a rehearing of this Court's order dated November 25, 1957, denying the peti-

tion for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, and, in support thereof, respectfully shows:

Grounds for Rehearing

I. An Intervening Indiana Decision Shows That the Decision Herein Determined Indiana Law Erroneously.

On November 22, 1957, three days before this Court denied the petition for certiorari herein, the Appellate Court of Indiana decided an appeal in *Sims v. Sims*,[1] involving the rule that the amount of alimony should be measured by the amount of property which a widow would take upon her husband's death. For a unanimous Appellate Court, Chief Justice Crumpacker held:

> "The evidence in the record most favorable to the court's adjudication of property rights between the parties tends to establish the *appellant's net worth at the time of trial at $250,250.00*. According to the appellant's own figures the cash and tangible property awarded to the appellee by the court's decree aggregates $91,607.93. That is approximately $8,000.00 over and above what the appellee could have taken despite an unfavorable will had the appellant died."

This computation coincides with that made by the taxpayer in this case, since one-third of the estate of $250,250.00 after debts, but before deduction of any inheritance or estate taxes, is $83,417.17 or $8,190.00 less than the alimony figure the court was comparing. The Appellate Court of Indiana, which has appellate jurisdiction over the apportionment of federal estate and Indiana inheritance taxes, has thus, for the first time, indicated expressly that no apportionment of the federal estate tax

[1] Indiana Appellate Court No. 18794.

should be made against the statutory share of a widow who elects to take against a will. The *Sims* decision was unanimous. Participating in it was Judge Wilbur Royse, who wrote the opinion of the Appellate Court in *Pearcy v. Citizens Bank & Trust Co.* (1951), 121 Ind. App. 136, 96 N. E. 2d 918, 925-927, 98 N. E. 2d 231. The *Pearcy* case arose on facts which preceded the 1948 federal marital deduction act, but it adopted the Kentucky rule of equitable apportionment of federal estate taxes without any statute governing apportionment. Although most of the equitable apportionment states are such by statute, the *Pearcy* case leaves no question that both Indiana and Kentucky are equitable apportionment states without statute. All the equitable apportionment states, including Kentucky,[2] which considered the apportionment of federal estate taxes against a widow's share in property qualifying for the marital deduction have refused equitably to apportion any part of the federal estate tax against such property, since such property does not give rise to any part of the tax. The Sims case now applies the rule of equitable apportionment which became law in Indiana with the *Pearcy* case in exactly the same fashion as all the other equitable apportionment states have applied it to marital deduction property.

In the face of the Indiana Appellate Court's opinion as expressed in the *Sims* case, the Seventh Circuit's reversal of the Marion County Probate Court's and the United States District Court for the Southern District of Indiana's determination of Indiana law herein is definitely erroneous. The Seventh Circuit ignored the terms of the will, the reasoned construction of the will by the trial Courts and the Statutes (Burns' 6-1907 and 6-2334) and decisions (*Rocker v. Metzger*, 171 Ind. 364 and *Cassid v.*

[2] *Lincoln Bank and Trust Co. v. Huber* (Ky. 1951), 240 S. W. 2d 89.

Padgett, 99 Ind. App. 239) on the effect of a widow's election to take against a will. It ignored the rule of the *Pearcy* decision, apparently on the basis that the facts in the *Pearcy* case were distinguishable, which was strictly true. (See Seventh Circuit's Opinion, Petition P. 33, n. 7.) The Seventh Circuit based its unique interpretation of Indiana law on part of the reasoning (not the holding) of *Clark v. Clark* (1892), 132 Ind. 35 and *Rawley v. Sanns* (1895), 141 Ind. 179, two cases involving title to real estate and holding that a surviving husband elected by estoppel to take *under* his wife's will pursuant to 1891 statutory provisions which were repealed in 1907 by Burns' 6-2334, and on a third case, *Cornet v. Guedelhoefer*, 219 Ind. 200, in which no surviving spouse was involved and the court enforced a specific agreement of the parties to repay an advancement for $900.00 of federal estate taxes when the personal property in the estate was insufficient to pay the tax. The *Sims* case establishes that the trial Courts herein were right. The Indiana rule of equitable apportionment as announced in the *Pearcy* case means that Indiana law precludes the apportionment of any part of the federal estate taxes against property which would otherwise qualify for the marital deduction, even when such property comes to the widow because of her election against a will.

The preceding argument (I) and the related point following (II) establish grounds for a rehearing because of intervening circumstances of substantial or controlling effect, as in *Sanitary Refrigerator Co. v. Winters*, 280 U. S. 30, 34, footnote 1, and *Massey v. United States*, 291 U. S. 608.

II. Conflict With Other Circuits and Decisions of This Court.

In view of the fact that Indiana is now clearly established as an equitable apportionment state, even as to a widow's property acquired by election against a will and since the 1948 federal marital deduction act, *the decision of the Seventh Circuit herein conflicts with the Third Circuit's decisions in Babcock's Estate v. Commissioner (1956), 234 F. 2d 837 and Gallagher v. Smith (1955), 223 F. 2d 218 and the Fourth Circuit's decision in Pitts v. Hamrick (1955), 228 F. 2d 487.* The *Babcock* case involved a widow's election against the will and is in all material facts identical with this, except that it reversed the Tax Court and held for the taxpayer. The decision herein fails to give controlling effect to state law on federal estate tax apportionment as required by *Riggs v. Del Drago* (1942), 317 U. S. 95 and to the definitive effect of the Probate Court's determination of questions of state law, as required by *Blair v. Commissioner*, 300 U. S. 5, 9, 10.

III. Under Any Construction of the Will, the Tax Clause Has Some Effect On the Widow's Share.

The petition for certiorari failed to make one argument based on the terms of the will herein, because the necessity of such an argument was not apparent under a correct application of the express direction in the will (Item I and Item V, 10) that petitioner should pay inheritance and estate taxes out of the residue of the will. The correct interpretation of this clause is that it was unaffected by the widow's election to take against the will (except as such election reduced the residuary property), since this was not a provision for the widow and could not be renounced by her. Burns' (1933) 6-2334 (pages 74-75 of

Petition herein). *Commerce Union Bank v. Albert* (Tenn. 1957), 301 S. W. 2d 352.

However, *even under the incorrect interpretation that said clauses are beneficial provisions for the widow (see Seventh Circuit's Opinion in Petition, page 30), the widow is still entitled to have one-half of her estate and inheritance taxes paid out of the residue and not assessed against marital deduction property which she took free of the residuary trust.* Under Indiana law, when a widow renounces her interest in a will, she gets not only her statutory share, but, in addition, her intestate share of any provisions for her in the will. *Rocker v. Metzger* (1908), 171 Ind. 364, 86 N. E. 403, 404, 405. This applies to residuary provisions such as Item V, 10 of the will herein, since the residuary property has no place to go upon lapse except to pass by intestacy. *Cassidy v. Padgett* (1934), 99 Ind. App. 234, 190 N. E. 133, 136. It cannot be argued, in the face of these Indiana decisions, that a widow's rights upon renunciation are purely statutory and render the will a complete nullity as to her. *Piersol v. Hays* (1943), 113 Ind. App. 214, 47 N. E. 2d 834 held that a will governs the administration of the entire estate, including intestate property.

Here a fund, part of the residuary trust, was set aside for the payment of estate and inheritance taxes. Even though this fund be construed as a benefit to the widow, her renunciation could not divert the fund from its intended use or write a clause in the will giving it to someone else. It became intestate property, available in equal shares to the widow and her daughter, testator's only heirs at law. In fact, it was all used to pay all of the inheritance and estate taxes, as the stipulation herein showed. Even under the Seventh Circuit's construction

of the will, the widow was entitled to one-half of her beneficial interest in this fund by intestacy, so that at least one-half of the inheritance and estate taxes against her marital deduction property should have been paid out of the residue and could not reduce the marital deduction. Under this view, a refund of half the amount ordered by the District Court, or $11,347.26, with interest at 6% from July 15, 1954 is due petitioner.

This new substantial grounds was not previously argued by the petitioner and is ground for rehearing under *Schriber-Schroth Co. v. Cleveland Trust Company*, 305 U. S. 47, 50.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

.....

RALPH B. GREGG,
Counsel for Petitioner.

Of Counsel:
ARTHUR H. NORTHRUP.

CERTIFICATE OF COUNSEL

I, Ralph B. Gregg, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the rules of this Court.

.....

RALPH B. GREGG,
Counsel for Petitioner.